Form No. 7 B & P SCO

San Francisco
Law Library

No.....

Presented by

.....

EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 1455

UNITED STATES CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT.

A. ZIMMERMAN, ED. WURZBACHER, ROY FAIRBANKS and ANDREW JACK,

Plaintiffs in Error,

vs.

JAMES FUNCHION and AMY SALE,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Territory of Alaska Third Division.

FILMER BROS. CO. PRINT, 1642 HOWARD ST., S. F. CAL.

No. 1455

UNITED STATES CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT.

A. ZIMMERMAN, ED. WURZBACHER, ROY FAIRBANKS and ANDREW JACK,

Plaintiffs in Error,

vs.

JAMES FUNCHION and AMY SALE,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Territory of Alaska Third Division.

FILMER BROS. CO. PRINT, 1642 HOWARD ST., S. F. CAL.

INDEX.

In the District Court, for the Territory of Alaska, Third Division.

JAMES FUNCHION et al.,

Plaintiffs,

vs.

A. ZIMMERMAN et al.,

Defendants.

Stipulation that Original Exhibits may be Attached to Transcript of Record, etc.

It is hereby stipulated by and between the plaintiffs and the defendants, by and through their attorneys, that the original exhibits introduced upon the trial of this cause and denominated Plaintiffs' Exhibit "C," Plaintiffs' Exhibit 4, Plaintiffs' Exhibit "A," for the purpose of identification, and Defendants' Exhibit "B," may be attached to the transcript on appeal in this case, and that an order may be made in accordance herewith.

CLAYPOOL, KELLUM & COWLES,
Attorneys for Plaintiffs.
McGINN & SULLIVAN,
Attorneys for Defendants.

[Endorsed]: No. 572. In the District Court, Territory of Alaska, Third Division. Funchion et al, vs. Zimmerman, et al. Stipulation to Name Or-

iginal Exhibits. Filed in the District Court, Territory of Alaska, 3d Division. Feb. 25, 1907. ————, Clerk. By ————, Deputy.

In the District Court for the Territory of Alaska, Third Division. Funchion vs. Zimmerman. Stipulation.

No. 1455. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 13, 1907. F. D. Monckton, Clerk.

In the District Court for the Territory of Alaska, Third Division.

JAMES FUNCHION et al.

vs.

A. ZIMMERMAN, et al.

Clerk's Certificate to Transcript of Record.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Edward J. Stier, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the following typewritten pages numbered from 1 to 275, inclusive, constitute a full true and correct copy, and the whole thereof, including the endorsements thereon of the complaint, amended complaint, answer, reply, judgment, testimony, bill

of exceptions, assignment of errors, and all other parts of the record called for in the praecipe to furnish the transcript on writ of error in the above-entitled cause.

I do further certify that the cost of preparing said record was $113.75, and that the same has been paid by defendants in error.

In witness whereof I have hereunto set my hand and affixed the seal of the court at Fairbanks, Alaska, this 25th day of February, A. D. 1907.

[Seal] EDWARD J. STIER,
Clerk of the District Court, Territory of Alaska, Third Division.

By E. A. Henderson,
Deputy.

In the District Court in and for the Territory of Alaska, Third Division.

No. 572.

JAMES FUNCHION and AMY SALE,
Plaintiffs,

vs.

A. ZIMMERMAN, ED. WURZBACHER, ANDREW JACK and ROY FAIRBANKS,
Defendants.

Complaint.

The plaintiffs herein complain of defendants and for cause of action allege:

1.

That they are the owners of that certain placer mining property situated within the Fairbanks Recording District, Territory of Alaska, Third Division, and known and described as follows, to wit:

Creek placer mining claim Number Six (6) Above Discovery on Dome creek; the boundaries thereto being substantially as follows: Starting from the initial stake at the upper end of said claim, approximately in the center thereof, thence north a distance of about three hundred (300) feet to the northeast corner stake; thence from said northeast corner stake in a westerly direction and slightly to the south to a stake marked "Lower right limit corner stake between creek claim numbered Five (5) and Six (6)"; thence in a southerly direction deviating slightly to the west, a distance of about three hundred and seventy (370) feet to another stake marked the "Corner stake, left limit, between Six (6) and Five (5) creek claims"; thence running in a direct line northeasterly to a stake marked "Upper corner stake of Number Six (6) creek claim, left limit"; thence northerly a distance of about three hundred (300) feet to the place of beginning.

2.

That on or about September 17, 1902, the plaintiff James Funchion, as the duly qualified and acting attorney and agent of one John C. Ross, entered upon said placer mining claim, the same being then vacant and unoccupied mineral ground of the public domain of the United States of America, and for and on behalf of said Ross, duly located, staked, and marked the boundaries of said claim; and thereafter said Ross duly conveyed to said Funchion an undivided one-half interest in and to said ground, and during the month of October, 1903, said Ross and Funchion sunk a hole to bedrock on said property a distance of approximately twenty-two (22) feet and at or near bedrock discovered gold in such quantities as to warrant them in further investing their time and money in working and developing the said claim, and thereafter and subsequent to the said discovery of gold, the said John C. Ross duly conveyed his remaining one-half interest in said claim to the plaintiff Amy Sale. At all the times in this paragraph mentioned no person or persons or claimants other than said mentioned parties entered upon said claim or asserted any right or title thereto.

3.

That heretofore, and since said plaintiffs had entered into the possession of and acquired the title to said claim, herein described, and after due location,

staking, marking of boundaries, and discovery of gold thereon, the defendants, A. Zimmerman, Ed. Wurzbacher, Andrew Jack, and Roy Fairbanks, by themselves, their agents, servants, and employees, and while these plaintiffs were in the lawful and peaceable possession of said property, wrongfully and unlawfully entered upon a portion of said claim, to wit: At a point about fifty (50) feet south of the north boundary, and about one hundred (100) east of the west boundary thereof, and ever since said entry said defendants have been and now are retaining the possession of such portion of said claim, and refuse to depart therefrom, although warned and requested by said plaintiffs so to do.

4.

That the defendants, as aforesaid, are wrongfully mining and working the said property and extracting the valuable gold minerals therefrom, and appropriating the same to their own use, to the great and irreparable injury and damage of these plaintiffs, and further threaten to continue working and mining the said property to the further great injury and irreparable damage of these plaintiffs, and that the defendant will, unless restrained by this Honorable Court, continue to mine and work the said property and extract the valuable minerals therefrom and appropriate the same to their own use so that the same will be entirely and forever lost to these plaintiffs.

5.

That the defendants by their wrongfully withholding the possession of the said property from the said plaintiffs, and their wrongful and unlawful working of the same, as aforesaid, have greatly injured and damaged these plaintiffs, to wit: In the sum of fifty thousand ($50,000.00) dollars.

Wherefore the plaintiffs ask judgment:

First: That they have restitution of the said property and the whole thereof.

Second: That upon the final hearing hereof, the plaintiffs have judgment that they are the owners of the said property, and that the defendants have no right, title or interest therein or thereto.

Third: For a writ of injunction, pendente lite, issued out of and in accordance with the practice of this Honorable Court to be directed to the said defendants, to restrain them, their agents, servants and employees, from further carrying on mining operations upon the said property, and from in any manner hindering or obstructing plaintiffs, their agents, servants, and employees, or either of them in their rightful use and possession of the said property, and also for a restraining order to the same effect until an application for such injunction can be heard, and that this Honorable Court fix a day upon which this application for a temporary restraining order may be heard, upon such terms and conditions as may be

deemed just and equitable by the court, and that at the final hearing such injunction may be made perpetual.

Fourth: For the sum of fifty thousand ($50,000) dollars, on account of the wrongful action of the defendants, as herein set out.

Fifth: For their reasonable costs and disbursements herein.

Sixth: That the plaintiffs may have such other and further relief in the premises as to the court may seem just and equitable.

CLAYPOOL, KELLUM & COWLES,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

James Funchion, being first duly sworn, deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.

JAMES FUNCHION.

Subscribed and sworn to before me this 8th day of September, A. D. 1906.

[Seal] C. E. CLAYPOOL,
Notary Public.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funch-

ion and Amy Sale, vs. A. Zimmerman, Ed. Wurzbacher, Andrew Jack and Roy Fairbanks, Defendants. Complaint. Filed in the District Court, Territory of Alaska, Third Division. September 8, 1906. E. J. Stier, Clerk.

[Title of Court and Cause.]

Amended Complaint.

Plaintiffs complain of defendants and by way of amended complaint allege:

1.

That they are the owners of that certain placer mining property situated within the Fairbanks Recording District, Territory of Alaska, Third Division, and known and described as follows, to wit:

Creek placer mining claim No. 6 Above Discovery on Dome creek, the boundaries thereto being subsequently as follows: Starting from the initial stake at the upper end of said claim, approximately in the center thereof, thence northerly a distance of 269 feet to the northeast corner stake, and from said corner stake thence westerly for a distance of 1313 feet to a stake marked "Lower right limit northwest corner stake" between creek claims No. 5 and No. 6; thence in a southerly direction slightly to the west for a distance of 477.1 feet to another stake marked "West end center stake"; thence in a southerly direction for a distance of 233.8 feet to a stake marked

"Lower southwest corner stake," thence in an easterly direction for a distance of 1311 feet to a stake marked "Southeast corner stake," thence in a northerly direction for a distance of 301.5 feet to the point of beginning.

2.

That on or about September 18, 1902, the plaintiff James Funchion, as the duly qualified and acting attorney and agent of one John C. Ross, entered upon said mining claim, the same being then vacant and unoccupied mineral ground of the public domain of the United States of America, and for and on behalf of said Ross, duly located, staked, and marked the boundaries of said claim; and thereafter said Ross duly conveyed to said Funchion an undivided one-half interest in and to said claim, and during the month of October, 1903, said Ross and Funchion sunk a hole to bedrock on said property a distance of approximately twenty-two (22) feet, and at or near bedrock discovered gold in such quantities as to warant them in further investing their time and money in working and developing the said claim, and thereafter and subsequent to the discovery of gold, the said Ross duly conveyed his remaining one-half interest in said claim to the plaintiff Amy Sale. And at all of the times in this paragraph mentioned no person or persons or claimants other than said men-

tioned parties entered upon said claim or asserted any right or title thereto.

3.

That heretofore, and since said plaintiffs had entered into the possession of and acquired the title to said claim herein described, and after due location, staking, marking of boundaries, and discovery of gold thereon, the defendants, A. Zimmerman, Ed. Wurzbacher, Andrew Jack, and Roy Fairbanks, by themselves, their agents, servants, and employes, and while these plaintiffs were in the lawful and peaceable possession of said property, wrongfully and unlawfully entered upon a portion of said claim, to wit: At a point about fifty (50) feet south of the north boundary and about one hundred (100) feet east of the west boundary thereof, and ever since said entry said defendants have been and now are retaining the possession of such portion of said claim, and refuse to depart therefrom, although warned and requested by said plaintiffs so to do.

That the defendants, as aforesaid, are wrongfully mining and working the said property and extracting the valuable gold and minerals therefrom, and appropriating the same to their own use, to the great and irreparable injury and damage of these plaintiffs, and further threaten to continue working and mining the said property to the further great and irreparable damage of these plaintiffs, and that the de-

fendants will, unless restrained by this Honorable Court, continue to mine and work the said property and extract the valuable gold minerals therefrom and appropriate the same to their own use so that the same will be entirely and forever lost to these plaintiffs.

Wherefore the plaintiffs ask judgment:

First: That they have restitution of the said property and the whole thereof.

Second: That upon a final hearing hereof, the plaintiffs have judgment that they are the owners of said property and that the defendants have no right, title, or interest therein or thereto.

Third: For a writ of injunction, pendente lite, issued out of and in accordance with the practice of this Honorable Court to be directed to the said defendants, to restrain them, their servants, agents, and employees, from further carrying on mining operations upon the said property, and from in any manner hindering or obstructing plaintiffs, their servants, agents, and employees or either of them, in their rightful use and possession of the said property; and also for a restraining order to the same effect until an application for such injunction can be heard, and that this honorable court fix a day upon which this application for a temporary restraining order may be heard, upon such terms and conditions as may be deemed just and equitable by the court, and

that at the final hearing such injunction may be made perpetual.

Fourth: For their reasonable costs and disbursements herein.

Fifth: For such other and further relief in the premises as to the Court may seem just and equitable.

CLAYPOOL, KELLUM & COWLES,
F. de JOURNEL,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

James Funchion, being first duly sworn, deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the within and foregoing amended complaint, knows the contents thereof, and that the same is true, as he verily believes.

JAMES FUNCHION.

Subscribed and sworn to before me this 31st day of October, A. D. 1906.

[Seal] C. E. CLAYPOOL,
Notary Public.

Service of copy of the within and foregoing amended complaint is hereby admitted this —— day of November, 1906.

_____,
Defendants' Attorneys.

I, C. E. Claypool, one of the attorneys for plaintiffs, hereby certify that the within and foregoing is a true and correct copy of the original amended complaint on file herein.

_____,

Of Plaintiffs' Attorneys.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale vs. A. Zimmerman, Ed. Wurzbacher, Andrew Jack and Roy Fairbanks, Defendants. Amended Complaint. Filed in the District Court, Territory of Alaska, Third Division. November 20, 1906. E. J. Stier, Clerk.

[Title of Court and Cause.]

Answer.

Come now the defendants and answering the complaint of the plaintiffs on file herein say:

I.

That they deny each and every allegation, matter and thing contained in plaintiffs' complaint, and each and every part and the whole thereof.

And the defendants for a further separate and affirmative defense allege:

1.

That they are now and for a long time hitherto have been the owners in fee as to all persons, save

and except the United States in possession and entitled to the sole and exclusive possession of that certain piece of mining ground situated in the Fairbanks Recording District, District of Alaska, and known and designated as No. 6 Above Discovery on the right limit, first tier of benches on Dome Creek.

2.

That the property attempted to be described in the complaint of the plaintiffs, and which it is there alleged that these defendants unlawfully trespass upon, is included within the boundaries of said No. 6 above discovery, first tier, right limit.

3.

That the plaintiffs herein for no estate, right, title or interest in and to said property, or to any part thereof.

Wherefore, the defendants having answered the complaint demand that the plaintiffs recover nothing by this action; that these defendants be adjudged to be the owners in fee and entitled to the immediate and exclusive possession of said No 6 above discovery, first tier, right limit on Dome Creek, and that they recover their costs and disbursements, and that the plaintiffs have no estate therein.

McGINN & SULLIVAN,
Attorneys for Defendants.

United States of America,
District of Alaska,—ss.

I, ————, being duly sworn, say I am one of the defendants in the within entitled action; that I have read the foregoing answer; know the contents thereof, and the allegations herein are true as I verily believe.

A. ZIMMERMAN.

Subscribed and sworn to before me this 13th day of September, 1906.

[Seal] M. L. SULLIVAN,
Notary Public for the District of Alaska.

United States of America,
District of Alaska,—ss.

I hereby certify that the foregoing answer is a true and correct copy of the original.

————,
Of Attorneys for the Plaintiffs.

Service of a true copy of the within complaint is hereby accepted this 16th day of Oct., 1906.

CLAYPOOL, KELLUM & COWLES,
By C. E. CLAYPOOL,
Attorneys for the ————,

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale vs. A. Zimmerman, Ed. Wurz-

bacher, Andrew Jack and Roy Fairbanks, Defendants. Answer. Filed in the District Court, Territory of Alaska, Third Division. November 21, 1906. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Reply.

Come now the plaintiffs and in reply to defendants' affirmative answer and defense, deny the same and the whole thereof.

CLAYPOOL, KELLUM & COWLES, and
F. de JOURNEL,
Plaintiffs' Attorneys.

United States of America,
Territory of Alaska,—ss.

James Funchion, being first duly sworn, deposes and says: That he is one of the plaintiffs in the above-entitled action, that he has read the foregoing reply, knows the contents thereof, and that the same is true as he verily believes.

JAMES FUNCHION.

Subscribed and sworn to before me this 4th day of December, 1906.

[Notary Seal] C. E. CLAYPOOL,
Notary Public.

Service of copy of the within and foregoing reply is hereby admitted this 4th day of December, A. D. 1906.

_____,
Defendants' Attorneys.

I, C. E. Claypool, one of plaintiffs' attorneys, hereby certify that the within and foregoing reply is a true and correct copy of the original to be filed herein.

_____,
Of Plaintiffs' Attorneys.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale vs. A. Zimmerman, Ed. Wurzbacher, Andrew Jack and Roy Fairbanks, Defendants. Reply. Filed in the District Court, Territory of Alaska, Third Division. January 28, 1907. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

This cause coming on to be heard on the 21st day of November, A. D. 1906, before the Court, the parties and their respective attorneys being present, it was agreed and stipulated by and between the attorneys for plaintiffs and defendants in open court that trial by jury be waived and that all of the isues of fact in the case be submitted to, tried and de-

termined by the judge instead of the jury, all of the parties herein consenting thereto. Thereafter, from day to day, the Judge heard the evidence offered by both plaintiffs and defendants, and the whole thereof, and the taking of evidence offered by both plaintiffs and defendants having been completed, and the argument of counsel for both plaintiffs and defendants having been made, the question was submitted to the Judge upon the questions of fact and law for final verdict; and the Judge having duly heard and considered all of said evidence and the rules of law applicable thereto, does now hereby find the following facts:

I.

That the plaintiffs have established that the placer mining claim in controversy describel in their amended complaint as creek placer mining claim Number Six (6) above discovery on Dome Creek, Territory of Alaska, Third Division, was duly staked for one John C. Ross by James Funchion, his duly appointed attorney in fact, on or about September 18, 1902; the same being prior to said date vacant, unoccupied mineral ground of the United States, and that on said date and thereafter before defendants entered thereon the boundaries thereto were clearly indicated by stakes and monuments and by further blazing and marking the lines thereto so that the same could be readily traced upon the ground, and

that the said stakes and monuments were placed and established as follows: That said James Funchion placed his initial stake at the upper end of said claim, approximately in the center thereof, and thereupon had written a notice of location claiming twenty acres (20) in extent, and in size six hundred and sixty (660) feet in width by thirteen hundred and twenty (1320) feet in length. That thereafter said Funchion established his southeast corner stake, being the upper left limit corner stake, at a distance of about three hundred and one and eight-tenths (301.8) feet from his initial stake, and marked said stake as the "left limit upper corner stake" of said claim, and thereafter said Funchion established his northeast corner stake, being the right limit upper corner stake, at a distance of about two hundred and eighty-eight and nine-tenths (288.9) feet from his initial stake and marked the same as his "right limit upper corner stake" of said claim; that thereafter said Funchion established his northwest corner stake, being the right limit lower corner stake, by adopting the northeast right limit upper corner stake of creek placer mining claim number 5 (5), adjoining said claim number six, and marked the said stake as his right limit lower corner stake, the same being at about the distance of thirteen hundred and fifteen and four-tenths (1315.4) feet from his northeast upper corner stake, and that thereafter

said Funchion established his lower center stake by adopting the upper center stake of said creek claim number five (5) above discovery and next adjoining, at a distance of about four hundred and seventy-seven (477) feet from said northwest corner stake, and faced and marked said stake as his lower center stake, and that thereafter said James Funchion adopted for his southwest corner stake the southeast left limit corner stake of creek claim number five (5) next adjoining at a distance of about three hundred and sixty-four and four-tenths (364.4) feet from his lower center stake, and faced and marked said stake as his lower left limit corner stake, and that the distance between the southwest corner stake and the southeast corner stake of said claim is about thirteen hundred and twenty-five and one-tenth (1325.1) feet. That plaintiffs acquired title from the said John C. Ross by conveyance, and that plaintiff and their grantor ever since location thereof have been entitled to the possession of said claim, and have made due discovery of gold thereon in such quantities as to justify a prudent man in further expending his time and money in developing and working said claim, and ever since the year of location have expended more than one hundred ($100.00) dollars each year in working and developing the claim as assessment work thereon, and had on the 29th day of October, 1902, duly filed their location notice.

II.

That after the due location of said claim, and after the plaintiffs had acquired title thereto, and while they were entitled to the possession of the same, and were exercising dominion and control thereof, the defendants herein, by themselves, their servants, agents, and employees, entered upon the same at a point near the northwest corner thereof, and began to mine and extract gold therefrom and were so doing at the date of the institution of this action.

III.

That when the said claim was originally located, it was staked and located in excess of twenty (20) acres, to wit: In the full area of about twenty-one and seven-tenths (21.7) acres, but that said excess was claimed unintentionally and by mistake, and that plaintiffs have occupied and possessed the same in good faith in the belief that the area thereof did not exceed twenty (20) acres; and that said excess was not known and was not ascertained by either plaintiffs or defendants until after the institution of this action.

IV.

That the plaintiffs, before commencing this action, to wit: on or about September 1, 1906, caused a survey of said claim to be made by one R. A. Jackson, a competent surveyor, who after such survey and

measurement ascertained the area thereof to be about seventeen and *one-half* (17.5) acres.

V.

That after the institution of this action, both plaintiffs and defendants caused surveys of the premises included within the boundaries of said claim as originally staked and marked to be made by competent surveyors, who after survey and measurement ascertained that the claim as originally staked and marked contained more than twenty (20) acres, to wit, about twenty-one and seven-tenths (21.7) acres, and such survey was received and accepted by the parties hereto as correct.

VI.

That the said plaintiffs, when they had ascertained to their satisfaction that said claims was in excess, forthwith drew in their lines so as to disclaim such excess at a point two hundred and thirty-three and eight-tenths (233.8) feet south of the lower end center stake, as originally staked and located, and erected at said point a substantial monument and placed thereon their amended notice of location signed with their names, marking such post or monument as the "New southwest corner stake" of said claim, and claiming therefrom to the southeast corner stake as originally located, a distance of about thirteen hundred and eleven (1311) feet, and duly

filed a notice of said amended location, and notified the defendants herein, of their action. And that said error and miscalculation in originally staking said claim was made and committed by said James Funchion without fraud, but on the contrary in good faith and in the belief that the claim did not exceed twenty (20) acres in area.

VII.

That plaintiffs' amended location claims not to exceed twenty (20) acres, and that after duly recording the same, plaintiffs filed herein, by permission of the Court, an amended complaint, claiming the area set out and described in their amended location notice.

And as conclusions of law the Court finds:

I.

That the plaintiffs James Funchion and Amy Sale are entitled to a judgment ordering and adjudging that they are the owners in fee, as against every person whomsoever except the United States of America, as to the property set forth and described in their amended complaint in said cause, and known as creek placer mining claim, number six (6) above discovery, Fairbanks, Recording District, Territory of Alaska, and that said plaintiffs are entitled to the sole and exclusive, peaceable and quiet possession of the same.

II.

That the defendants at the time of their entry on said premises as described in plaintiffs' amended complaint had no right, title, interest or estate in said described premises, or in any part or portion thereof, and that their entry was unlawful and without color of title, and that they have since said time acquired no right in and to said property.

III.

That plaintiffs have judgment in accordance herewith.

Done by the Court this 28th day of January, 1907.

JAMES WICKERSHAM,

Judge.

Entered in Court Journal No. 7, page 204.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale vs. A. Zimmerman, Ed. Wurzbacher, Andrew Jack and Roy Fairbanks, Defendants. Findings of Fact and Conclusions of Law. Filed in the District Court, Territory of Alaska, Third Division. January 28th, 1907. E. J. Stier, Clerk. By E. A. Henderson. Deputy.

[Title of Court and Cause.]

Judgment.

This cause having come on regularly for trial on this 21st day of November, A. D. 1906, the plaintiffs appearing in person and by their attorneys, C. E. Claypool and F. de Journel, and the defendants appearing in person and by their attorney John L. McGinn, and said action having been duly tried by the Court under stipulation of the counsel for both sides, and oral and documentary evidence having been introduced by and on behalf of both plaintiffs and defendants, and the cause having thereafter been argued by attorneys for both plaintiffs and defendants, and the Court having heretofore found and established its findings of fact and conclusions of law, and ordered judgment; it is therefore,

Ordered, adjudged, and decreed, that the plaintiffs are the owners in fee and entitled to the exclusive use and possession, as against every person whomsoever except the United States of America, of that certain placer mining claim, known as creek placer mining claim number six (6) above discovery on Dome Creek, in the Fairbanks Recording District, Territory of Alaska, and more fully and particularly described by metes and bounds as follows:

Creek placer mining claim No. 6 above discovery on Dome creek, the boundaries thereto being substantially as follows: Starting from the initial stake at the upper end of said claim, approximately in the center thereof, thence in a northerly direction a distance of about two hundred and eighty-eight and nine-tenths (288.9) feet to the northeast corner stake of said claim, thence in a westerly direction a distance of about thirteen hundred and fifteen and four-tenths (1315.4) feet; thence in a southerly direction a distance of about four hundred and seventy-seven (477) feet to the lower center stake of said claim; thence in a southerly direction a distance of about two hundred and thirty-three and eight-tenths (233.8) feet to a stake at the southwest corner marked "lower southwest corner stake"; thence in an easterly direction for a distance of about thirteen hundred and eleven (1311) feet to the southeast corner stake of said claim; thence in a northerly direction for a distance of about three hundred and one and eight-tenths (301.8) feet to the point of beginning; and that the defendants herein have no right, title, interest or estate therein, or in any part or portion thereof. It is further

Ordered that the plaintiffs have and recover of the defendants their costs and disbursements incur-

red in said cause, to be taxed by the clerk at ——— dollars.

By the Court:

JAMES WICKERSHAM,
Judge.

Entered in Court Journal No. 7, page 220.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale vs. A. Zimmerman, Ed. Wurzbacher, Andrew Jack and Roy Fairbanks, Defendants. Judgment. Filed in the District Court, Territory of Alaska, Third Division. February 2, 1907. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Bill of Exceptions.

Be it remembered that this case came on for trial before the Court sitting without a jury, Hon. James Wickersham, Judge, presiding, at ten o'clock A. M. on November 21st, 1906, the plaintiffs appearing by their attorneys, Messrs. C. E. Claypool and Ferdinand de Journel, and the defendants appearing by their attorney, Mr. John L. McGinn, of the firm of McGinn & Sullivan, and the following proceedings were had and testimony taken, to wit:

Mr. CLAYPOOL.—We offered to file an amended complaint in this action, and my memory is not very clear as to how the record stands. In order to make the record safe I would like to have our motion formally granted now as of then granting us leave to file the amended complaint; and it is understood that the answer on file may stand as the answer to the amended complaint. As I didn't discover any copy of answer in my papers, and as I didn't find it in my jacket, I prepared no reply. The reply will be simply a denial.

Mr. McGINN.—The answer that was prepared in this case was intended for the original complaint, but I think it is sufficient to meet the amended complaint, and counsel have agreed that it may stand as the answer to the amended complaint.

The COURT.—And that the reply will be a general denial?

Mr. McGINN.—Yes, sir.

Mr. CLAYPOOL.—And the order will be entered that we have leave to file that amended complaint?

The COURT.—Yes. The record may show that. This is a suit in ejectment, is it?

Mr. CLAYPOOL.—Yes, sir, intended to be a suit in ejectment.

Mr. McGINN.—I suppose the record ought to show that there is a waiver of the jury on both sides.

Mr. CLAYPOOL.—Yes, there is a waiver of jury on both sides.

The COURT.—Let the record show that.

(Here Mr. Claypool makes his statement of the case on behalf of the plaintiffs, whereupon Mr. McGinn made a statement of the case on behalf of the defendants.)

Mr. CLAYPOOL.—I desire to introduce first the original notice of location, and in its place I will ask leave to introduce a certified copy so that it may remain in the record asking formal leave to withdraw the original.

The COURT.—What is this?

Mr. CLAYPOOL.—The original location notice, and I ask counsel to let me introduce a certified copy.

Mr. McGINN.—(After examining paper.) We object to this as it does not describe the claim with reference to natural objects and permanent monuments so that it can be readily identified.

The COURT.—The objection may be overruled, and it may be admitted.

(Marked Plaintiffs' Exhibit 1.)

Plaintiffs' Exhibit 1.

LOCATION NOTICE.

Notice is hereby given that the undersigned has located 20 acres of placer mining ground on Dome Creek in the Circle Recording District, District of Alaska, described as follows:

Commencing at a stake bearing location notice and joining No. 7 above discovery; thence down stream a distance of 1320 feet to a stake; thence 660 feet in width of said claim.

This claim to be known as No. 6 above discovery on Dome Creek.

Located this, the 18th day of September, 1902.

J. C. ROSS,

By His Attorney, JAMES FUNCHION.

Witness: HERBERT E. WILSON.

Filed for record, October 29th, 1902, at 1:30 P. M.

CHARLES ETHELBERT CLAYPOOL,

Commissioner and Ex-officio Recorder.

By J. T. Cowles,

Deputy.

(Certified as a true copy of the record as the same appears in Volume 1 of Locations, page 23, on the records of the Fairbanks Precinct, Third Division, Territory of Alaska. By G. B. Erwin, Commissioner and Ex-officio Recorder.)

Mr. CLAYPOOL.—I now offer in evidence a deed from John C. Ross to James Funchion, a certified

copy of the record, for an interest in this claim as stated in the complaint.

(Mr. McGinn examines paper.)

The COURT.—If there is no objection it may be admitted.

(Marked Plaintiffs' Exhibit 2.)

Plaintiffs' Exhibit 2.

No. 2802.

This indenture, made this 12th day of July, in the year of our Lord one thousand, nine hundred and four, between John C. Ross, the party of the first part and James Funchion, the party of the second part,

Witnesseth: That the said party of the first part for and in consideration of the sum of one dollar gold coin of the United States to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part and to his heirs and assigns, that certain tract of land situate, lying and being in the Fairbanks Recording District, District of Alaska, particularly bounded and described as follows, to wit:

An undivided one-half interest in and to placer mining claim No. 6 above discovery on Dome Creek, a tributary of the Chateneka River.

Together with the appurtenances. To have and to hold the said premises with the appurtenances unto the said party of the second part and his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN C. ROSS. [Seal]

Signed, sealed and delivered in the presence of:

JAS. TODD COWLES,

C. E. CLAYPOOL.

Duly acknowledged on the 12th day of July, 1904, before

JAS. TODD COWLES,

Notary Public.

Filed for record July 13th, 1904, at 12:10 P. M.

EDWIN J. STIER,

Commissioner and Ex-officio Recorder.

(Certified by G. B. Erwin, Commissioner and ex-officio Recorder of the Fairbanks Precinct, Third Division, Territory of Alaska, as being a true copy of Deed No. 2802, as the same appears in the records of said Commissioner's office in volume 2 of Deeds, at page 41.)

The COURT.—That is of an undivided one-half interest?

Mr. CLAYPOOL.—Yes, sir. Shall I read it?

Mr. McGINN.—It may be considered as read.

Mr. CLAYPOOL.—I now offer in evidence a deed from John C. Ross to the plaintiff, Amelia M. Sale. I submit the original to counsel for examination and ask to introduce a certified copy of the record. You have no objection to that?

Mr. McGINN.—No.

The COURT.—Let it be admitted.
(Marked Plaintiffs' Exhibit 3.)

Plaintiffs' Exhibit 3.

QUITCLAIM DEED.

No. 9111.

This indenture made this, the 15th day of April, 1905, by and between John C. Ross of Fairbanks, in the District of Alaska, grantor, and Amelia M. Sale of Dawson, Yukon Territory, grantee.

Witnesseth: That for and in consideration of the sum of three dollars (3.00) to him in hand paid the receipt whereof is hereby acknowledged said grantor has bargained, sold and quitted claim and by these presents does hereby bargain, sell and quitclaim unto the said grantee the following described property situate, lying and being in said Fairbanks District of Alaska, to wit:

1. An undivided one-half interest in Creek placer mining claim No. Six (6) above discovery on Dome Creek, a tributary of the Chateneka River.

(With other property.)

In witness whereof, I have hereunto set my hand and seal this the 15th day of April, 1905.

JOHN C. ROSS. [Seal]

United States of America,
Territory of Alaska,—ss.

This is to certify that on this 15th day of April, 1905, before me, a notary public for Alaska, duly commissioned and qualified personally appeared John C. Ross, the person named as grantor in the foregoing instrument, and who acknowledged to me that he executed said instrument as and for his free and voluntary act and deed for the uses and purposes therein mentioned.

In witness where I have hereunto set my hand and seal, this the day and year last-above written.

[Seal] H. J. MILLER,
Notary Public for Alaska.

Filed for record May 11th, 1905, at 20 minutes past 12 P. M.

E. M. CARR,
Commissioner and Ex-officio Recorder.
By John L. Long,
Deputy.

(Certified by G. B. Erwin, Commissioner and ex-officio Recorder for the Precinct of Fairbanks, Third Division of the Territory of Alaska, as a true and correct copy of deed No. 9111, as the same appears in volume 3 of Deeds, page 477, in the Records of his said office.)

Mr. CLAYPOOL.—I will offer at this time to introduce the original amended notice of location calling the Court's attention to, the misrecital on page 2 as to what is on that stake; it should be "above" instead of "below." Have you any objection to that?

Mr. McGINN.—Yes, sir, considerable objection.

Mr. CLAYPOOL.—I will offer it later then when we come to that branch of the case.

JAMES FUNCHION, one of the plaintiffs sworn on behalf of plaintiffs, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. You may state your name to the Court.

A. James Funchion.

Q. What is your business? A. Mining, sir.

Q. How long have you lived in Alaska?

A. I have been in Alaska since 1886; I came to Juneau in '86 and came in here in 1902.

(Testimony of James Funchion.)

Q. How long have you resided in the Fairbanks District?

A. Since I came here in the winter of 1902.

Q. Are you acquainted with the property known as Six Above Discovery on Dome Creek?

A. Yes, sir.

Q. You are one of the owners of that property?

A. Yes, sir.

Q. What interest have you in it?

A. An undivided one-half interest.

Q. Are you acquainted with one John C. Ross?

A. Yes, sir.

Q. How long have you known him?

A. I have known him about ten years.

Q. Are you acquainted with one Herbert E. Wilson? A. Yes, sir.

Q. How long have you known him?

A. About five or six years, I guess; about six years.

Q. You may state where you were about the 18th of September, 1902? A. On Dome Creek.

Q. On Dome Creek in this Recording District?

A. Yes, sir, but then it was not called the Fairbanks Recording District at that time; it was the Circle District.

Q. Who was with you on that occasion?

(Testimony of James Funchion.)

A. Herbert E. Wilson.

Q. What did you do that day, if anything, with reference to the property described in your complaint, and now known as Number Six Above Discovery on Dome Creek?

A. We staked it on the 18th.

Q. You mean you and Mr. Wilson staked it?

A. Yes, sir.

Q. He helped you stake it?

A. Yes, sir, because I helped him stake Five.

Q. And he helped you stake Six?

A. Yes, sir.

Q. In what manner did he assist you?

A. After we put in the upper center stake of Five we went on up the creek and came to that big tree.

Q. Indicate upon the map—had it better be marked for identification, or just use it for illustration?

Mr. McGINN.—I think both of them had probably better be marked, one as defendants' exhibit.

The COURT.—They may be marked as A & B.

Mr. CLAYPOOL.—We offer to introduce it as Plaintiffs' Exhibit "A" for the purpose of illustration, is that satisfactory?

Mr. McGINN.—Yes.

(Testimony of James Funchion.)

The COURT.—Let the record show that both of them are admitted for that purpose, both maps.

(Maps marked Plaintiffs' Exhibit "A" and Defendants' Exhibit "B.")

Mr. CLAYPOOL.—(Referring to map.) This represents the upper center stake of Five Creek Claim.

Mr. McGINN.—Let the witness testify.

Mr. CLAYPOOL.—He has already stated that after this stake was fixed, the upper end of Five, that he went on up the creek.

The COURT.—He may go on and state what he did.

Mr. McGINN.—I do not think he ought to have the map before him to testify to that.

The WITNESS.—We went up and put in the upper center stake of Six and made that the Initial stake. It is a big tree about eight inches through.

Q. Cut off at about what heighth?

A. About five or six feet high. We didn't cut that tree off at that time, we just squared it; it has been cut off since, but I don't know when it was done.

Q. Who did the writing on that tree.

(Testimony of James Funchion.)

A. Herbert Wilson wrote the location notice.

Q. Do you recollect substantially what he wrote on it? A. Yes, sir.

Q. Relate it as nearly as you can?

A. We copied it off of there for the record just as we wrote it there, just what was on the stake at that time. You cannot make it out now, but we put on the record just exactly as we put it on the stake.

Q. Claiming what?

A. Claiming twenty acres for placer mining ground, running down stream 1320 feet by 660 feet in width.

Q. Who signed that notice written there.

A. I signed it.

Q. In what capacity?

A. John C. Ross by his attorney in fact James Funchion.

Q. Is that notice there yet?

A. Yes, but it is so long ago that it is dim.

Q. Is the stake there yet?

A. The stake is there yet, yes, sir.

Q. Is the notice there? A. Yes, sir.

Q. As it was then, except the tree has been cut off above this notice, is that right?

A. Yes, sir.

(Testimony of James Funchion.)

Q. Where did you then proceed to?

A. While Herb was writing the notice and helping me to blaze, I went out and put them upper corners out.

Q. Then where did you go?

A. Herb went up the creek to No. 7 and I done some panning around there. Then when he came down, on our way down we put out the lower stake; he and I went out and put out that lower right limit corner stake. He put it out and I blazed the line.

Q. Who marked it?

A. He marked it the corner between five and six creek claim, it was the dividing corner between both claims. Then I went over on that left limit side and climbed up over that steep bank on that mountain side that you see, and put out that corner.

Q. That was the last corner put down?

A. Yes, sir.

Q. Was it your intention to take more or less than twenty acres?

Mr. McGINN.—We object to that as immaterial.

(Objection overruled. Defendants except.)

A. I just intended to stake twenty acres, that was all. I always thought that we were under twenty acres.

Q. What further did you and Mr. Ross do about that claim, if anything?

(Testimony of James Funchion.)

A. Then in 1903, Ross and I went over from Pedro, cut trail up Flume Creek, and went over there and sunk a hole to bedrock.

The COURT.—When was that?

A. In 1903. I and Jack Ross cut a trail up Flume Creek from Pedro, thence down a pup that comes in on Six on Dome, and we sunk a hole there. We were the only ones on the Creek at that time, except Bismark and Bush; they were sinking above the creek. That was the first hole put to bedrock from there down. We were the only ones there on that creek at that time, except Bismark and Joe Bush. They were up above.

Q. Was there anyone else making any claim to any portion of this claim at that time?

Mr. McGINN.—We object to that as immaterial.

(Objection overruled. Defendants except.)

A. No, sir, there were no benches staked there at that time.

Q. How deep did you sink the hole?

A. It was 22 feet. It was down near the creek.

Q. What did you find? A. We found gold.

Q. You went to bedrock? A. Yes, sir.

Q. And you since have had the annual labor performed, have you? A. Yes, sir.

Q. Are you acquainted with the defendant Zimmerman? A. Yes, sir.

(Testimony of James Funchion.)

Q. How long have you known him?

A. I think the first time I met him was in the spring of 1905.

Q. Had Mr. Zimmerman ever done any work on this property for you or on your behalf?

A. On Six, yes, sir; he did the assessment work for one year.

Mr. McGINN.—We object to that as immaterial.

(Objection overruled. Defendants except.)

Q. What year was that?

A. In 1904, I think if I remember right. Yes, sir.

Q. He performed the work for you that year?

A. Mr. Ross had him do the assessment work. I didn't see him.

Q. He did it for you and Ross?

A. For me and Ross.

Q. You are acquainted with Mr. Jackson, the surveyor? A. Yes, sir.

Q. State whether or not you ever had Mr. Jackson do any work on the property for you.

A. He surveyed it. He made the first survey of it.

Q. Did he make any return to you of that survey? A. Yes, sir.

(Testimony of James Funchion.)

Q. You may look at the paper which I now hand you and say whether that is—

A. Yes, sir, that is the one he gave me.

Q. That is the plat that he returned.

A. Yes, sir.

(Hands to Mr. McGinn.)

Mr. CLAYPOOL.—Have you any objection to it?

Mr. McGINN.—I object to it as wholly immaterial.

The COURT.—What is the purpose?

Mr. McGINN.—According to their own statements it is not a correct plat of the claim.

Mr. CLAYPOOL.—It is to bear out the testimony on the matter of our good faith that we had it surveyed to see if we had more than twenty acres in it.

The COURT.—After complaint had been made about the matter?

Mr. CLAYPOOL.—Yes, sir,

The COURT.—Objection overruled, it may be admitted.

Mr. McGINN.—We except.

(Marked Plaintiffs' Exhibit 4.)

(Testimony of James Funchion.)

Mr. CLAYPOOL.—Q. After you had this work done by Mr. Jackson and this plat had been returned to you, you may state what, if anything, you had done further by way of ascertaining the amount of ground embraced within this claim?

A. We had Mr. Allen out there.

Q. I want to call your attention first to another matter: Did you have anything done about the area of this claim by Mr. Zugg?

A. Mr. Zugg figured it out and made it under twenty acres.

Q. Do you remember after Zugg and Jackson had figured it over, what they said?

Mr. McGINN.—We object to that as immaterial.

(Objection overruled, defendants except.)

A. They said it was seventeen acres and some ten-hundredths.

Q. Under twenty acres? A. Yes, sir.

Q. What did you do further, and why did you take any further steps in the matter?

A. Well, because Mr. Zimmerman had sent a surveyor out and he brought it over twenty acres.

Q. You had been informed of that?

A. Yes, sir.

Q. Then what did you do?

A. And then we sent Mr. Allen out.

(Testimony of James Funchion.)

Q. Mr. E. G. Allen? A. Yes, sir.

Q. A surveyor? A. Yes, sir.

Q. And what did he return to you by way of result of his survey?

A. He brought it over twenty acres.

Q. Is this his map or plat? (Referring to Exhibit "A.") A. Yes, sir.

Q. After Mr. Allen had returned to you this plat and map which is marked Plaintiff's Exhibit "A," you may state what you then did with reference to the claim?

A. Then we went out on the ground and I offered Mr. Zimmerman—I told him that we had too much ground and that if he wanted to, I would give him 88 feet across the lower end of the claim, which would then give us twenty acres; and if he didn't take that then I would disclaim the excess over on the left limit.

Q. What did he say?

A. He said "go ahead."

Q. Indicate upon exhibit "A" about where the 88 feet is that you refer to.

A. Across the lower end, 88 feet right across the lower end there.

Q. What did he say to that, did he refuse?

A. Yes, sir.

(Testimony of James Funchion.)

Q. What did you do with reference to disclaiming on the other side?

A. I went over on the left limit and disclaimed that excess.

Q. In what manner?

A. By posting a notice there.

Q. Putting up another stake?

A. Putting up another stake.

Q. How far from the stake that you put on the hill on that corner, if you remember?

A. I don't remember I measured out from the center.

Q. Sufficient to reduce the claim to twenty acres?

A. Yes, sir.

Q. Drawing a line from the center as shown on Plaintiffs' Exhibit "A," 88 feet from the lower stake, center stake, across the claim as nearly as may be, state whether or not that would leave Mr. Zimmerman in possession of any work that he had done there?

Mr. McGINN.—We object to that as immaterial. (Objection overruled. Defendants except.)

Q. It would have given him his hole there that he was working in.

Mr. CLAYPOOL.—You may take the witness.

(Testimony of James Funchion.)

Cross-examination.

(By Mr. McGINN.)

Q. I will ask you to refer to Plaintiff's Exhibit "B," and state just what that shows and what claim it is? A. Yes, sir. No. 6.

Q. No. 6 on Dome Creek?

A. No. 6 above Discovery on Dome Creek.

Q. That is the property that you staked in September, 1902? A. Yes, sir, on the 18th.

Q. Where did you establish your initial post?

A. At the upper end here (showing).

Q. At the point indicated upon this plat by the letter "H"? A. Yes, sir.

Q. What was written upon that stake?

A. At this stake at "H"?

Q. Yes, sir.

A. As near as I remember it was wrote just as Mr. Claypool read it off there on our location notice.

Q. That you claimed 1320 feet downstream?

A. Thirteen hundred and twenty feet downstream.

Q. And 660 feet wide?

A. Six hundred and sixty feet in width.

Q. Then you established the upper corner stakes? A. Yes, sir.

Q. You did that? A. Yes, sir.

(Testimony of James Funchion.)

Q. (Continuing.) While Mr. Wilson went up and staked No. 7?

A. He staked No. 7 and I put out those corners.

Q. What, if anything, did you write upon the upper right limit corner stake?

A. Well, as near as I can remember I marked it the right limit corner stake between 6 and 7.

Q. Right limit corner stake between 6 and 7?

A. Yes, sir.

Q. You did that yourself?

A. Yes, I wrote that myself.

Q. Did you sign any name to that?

A. Not on the corner, no, sir.

Q. That is the corner indicated on the map by the letter "B." A. That is the corner, yes.

Q. The next stake that you established was the upper left limit corner, was it? A. Yes, sir.

Q. The corner indicated upon this map by the letter "G"? A. Yes, sir.

Q. What did you to there?

A. I marked it corner between 6 and 7.

Q. Just the same as the other?

A. Yes, sir.

Q. Corner between 6 and 7?

A. As near as I can remember.

Q. You can't remember that at this time?

(Testimony of James Funchion.)

A. Yes, sir.

Q. Did you establish any lower stakes?

A. As I was saying, I done some panning around the creek and waited until Wilson came down. We came down here (showing).

Q. Did you establish any stake at the point indicated upon that map by the letter "E"?

A. That same stake Herb wrote on it for the lower.

Q. What did he write upon that stake?

A. I don't remember the exact writing upon it.

Q. Don't you know as a matter of fact that you claimed 1320 feet upstream?

A. I think that is the way he wrote all his stakes. He wrote the same down here as he did up here (showing).

Q. You don't remember what it was?

A. No.

Q. Don't you know as a matter of fact that he claimed 1320 feet upstream and 330 feet on each side of that stake?

A. He wrote about the same on that stake; that 330 feet business; I don't remember anything about that.

Q. Did you ever see that upon that stake?

A. Not 330 feet.

Q. You never saw that there? A. No, sir.

(Testimony of James Funchion.)

Q. You say you then went and established your corner stakes, did you?

A. While Wilson was writing that there I went uphill. While he was writing that there I blazed the lines here and then he went out here and put this stake out (showing), and I blazed the line out after him. Wilson put in that corner there.

Q. At the point indicated upon the map by the letter A?

A. Yes, sir. Mr. Wilson put that corner in and I blazed the line out there (showing).

Q. Mr. Wilson put that corner in and you blazed the line out? A. Yes, sir.

Q. How did you blaze that line?

A. Along the trees.

Q. Indicate upon the plat where you blazed it.

A. Followed that line right out (showing).

Q. You mean this black line here?

A. This is a red line.

Q. The line from E to A?

A. Yes, right to this corner.

Q. You are sure that is the line you blazed at that time?

A. Yes, I am positive that is the line I blazed at that time.

Q. How many feet is that stake "A" from the lower center stake?

(Testimony of James Funchion.)

A. Something between—I forget now, something over 400 feet.

Q. How much over 400 feet?

A. I don't know.

Mr. CLAYPOOL.—We will admit the correct measurements.

Mr. McGINN.—It is about 476 feet, is it?

A. Yes, sir.

Mr. CLAYPOOL.—Something like that 477, I think, something in that neighborhood.

Mr. McGINN.—Four hundred and seventy-seven feet, something in that neighborhood?

A. Yes, sir.

Q. You saw your lower left limit corner stake indicated upon this plat by the letter "F" is how many feet from your lower center stake?

A. That is shown on the map.

Q. It shows there 364 feet?

A. That is about it.

Q. That is about correct, is it? A. Yes, sir.

Q. And the distances upon this map you think are about correct? They are conceded to be correct.

Mr. CLAYPOOL.—I think so.

The COURT.—So they correspond with the other map?

(Testimony of James Funchion.)

Mr. de JOURNEL.—Not quite, there is a very little difference.

The COURT.—If the figures are correct the Court will look at those distances.

Mr. McGINN.—(Continuing.) Q. Did you write upon this stake down here?

A. Yes, sir.

Q. What did you write upon that?

A. I marked it the corner between 5 and 6.

Q. Did anybody else write upon the stake at that time? A. No, sir.

Q. Do you know of any other writing being on that stake? A. No, I do not.

Q. You left there that day and when did you next go upon the property?

A. I went back—that was in 1902 and I was over there that winter, and I was also over there the next summer.

Q. What time were you over there that winter?

A. I don't remember now.

Q. Did you do anything over there?

A. No, sir. We didn't do anything until 1903 on that ground.

Q. Were you over there in 1903?

A. Yes, sir.

Q. Yourself? A. Myself and Jack Ross.

(Testimony of James Funchion.)

Q. And then what did you do?

A. We went and sunk a hole here.

Q. You say you went to bedrock a distance of 22 feet? A. Yes, sir.

Q. And then quit? A. Yes, sir.

Q. What was the extent of the gold you found?

A. We could get a cent and a cent and a half.

Q. Colors?

A. Colors of gold, yes, sir.

Q. You did one hundred dollars worth of work that year?

A. We did more than a hundred dollars worth that year, but afterwards, the next year, Mr. Zimmerman represented us.

Q. He did the assessment work for the next year? A. Yes, sir.

Q. Did you do any work upon it in 1904 yourself outside of what Zimmerman did? A. No.

Q. Did you do any work upon it in 1905?

A. Yes, sir, Mr. Zimmerman and his partner Gullickson had a lay there.

Q. Upon what property—upon what part of the property? A. Upon this part here.

Q. How long did they keep the lay?

A. They were there a couple of weeks.

Q. Did they do any work?

(Testimony of James Funchion.)

A. Yes, they sunk a hole to bedrock. I don't know whether it was before or after New Years, but I think it was after New Years.

Q. Of 1905?

A. If it was after New Years it was in 1906. It must have been after New Years in 1905.

Q. I ask you about this lay and I was trying to fix the time.

A. That was after New Years.

Q. And they put down a hole?

A. Yes, sir.

Q. They put a hole down to bedrock?

A. Yes, that is what they told me.

Q. What did they do then?

A. I don't know, I didn't bother.

Q. Where does the paystreak run along that claim?

A. The paystreak is about 150 feet inside of the side line up here.

Q. That is towards the creek?

A. Yes, sir, from the side line.

Q. From the letter "B" there?

A. Yes, sir.

Q. And it is running out from here? (Showing.)

A. Yes, sir.

Q. It runs right through this disputed part?

A. On the lower end, yes, sir.

(Testimony of James Funchion.)

Q. Who was the first to demonstrate that the paystreak was there?

A. We had the paystreak up here on Seven.

Q. Who was the first to demonstrate that the paystreak was along that disputed portion there?

A. When he sunk a hole there.

Q. Who do you mean by he?

A. Mr. Zimmerman, but the paystreak was located up here by Chamberlain before Zimmerman began to sink.

Q. You say that Zimmerman was the first to demonstrate that the paystreak was upon the part of the property now in dispute in this action.

A. He naturally thought so after the pay was—

Q. Answer that question, yes or no?

A. Certainly, yes.

Q. When did Mr. Zimmerman demonstrate that the paystreak was there?

A. Some time this summer, or this fall along in the latter part of August or the first of September sometime along there of this year.

Q. Then you got busy and started action against Mr. Zimmerman, didn't you?

Mr. CLAYPOOL.—We object to that form of question. It is an unnecessary reflection "you got busy," etc.

(Objection overruled.)

(Testimony of James Funchion.)

A. Certainly, he was working on our ground and we brought action against him.

Q. You knew Mr. Zimmerman was working upon this ground before that time?

A. I had not been over there. This summer was the first time I have been over there.

Q. You didn't know that Mr. Zimmerman claimed any portion of this ground?

A. He always claimed that we were too wide there.

Q. You knew that he did claim a portion of this ground?

A. I knew that he always claimed that we were too wide.

Q. Can you answer the question?

A. Yes, sir.

Q. Do you know whether he claimed a portion of this ground?

A. He claimed along to where he put his stakes, he overlaped.

Q. You saw his stakes there?

A. Yes, sir.

Q. You know he staked that ground on May 12th, 1904?

A. I know he overlaped us.

Q. You know his stake has been at the point up to where he now claims up to that time?

(Testimony of James Funchion.)

A. Yes, sir.

Q. Did you ever make any protest to him in regard to that? A. Yes, sir.

Q. When?

A. When I went over there in the spring of 1905.

Q. When did you first go over there in the spring of 1905? A. Sometime in April.

Q. And you stopped with Mr. Zimmerman at that time, did you not?

A. Yes, sir. Well, I spoke to him there.

Q. Mr. Zimmerman had a cabin on this claim, No. 6, first tier?

A. Yes, sir.

Q. You had lunch with him?

A. No, I had no lunch with him.

Q. Were you in his cabin while he had lunch?

A. I believe I did go up there. I don't remember now exactly. Yes, I think I was there close around speaking to him.

Q. Mr. Zimmerman had done considerable work on that property out there?

A. Not the piece in dispute.

Q. On his claim?

A. He had sunk some holes on his bench right down by the line, but he never represented that line until this summer.

Q. How many holes did he have to bedrock?

(Testimony of James Funchion.)

A. I don't know.

The COURT.—Did Mr. Zimmerman have a bench alongside of No. 6? A. Yes, sir.

Q. Whereabouts?

A. He had a bench off of Six, yes, sir. He had a bench adjoining our ground, he never worked on the disputed piece where he overlaped us until this summer in August or September.

Mr. CLAYPOOL.—Counsel for the defendants contend that their bench takes in this ground.

The COURT.—I supposed that he had staked merely the excess.

The WITNESS.—No, sir, he overlaped us. When he staked his ground, he overlaped us with his bench.

(By Mr. McGINN.)

Q. You say that he had done considerable work upon his claim?

A. He had punched up around our line there.

Q. Answer the question?

The COURT.—Answer the question and then make any explanation you have to make.

A. Yes, sir.

Q. He had done considerable work?

A. Yes, sir, he had.

Q. He had put how many holes to bedrock?

(Testimony of James Funchion.)

A. I don't know, I didn't count theu.

Q. You were out there in April, 1905?

A. Yes, sir.

Q. Who was with you? A. Mr. McPike.

Q. Before Mr. McPike was with you were you out there about a week before that?

A. I think I was, but I ain't sure.

Q. You were at Mr. Zimmerman's cabin at that time, were you not?

A. I don't remember whether I was at his cabin at that time or not.

Q. (Continuing.) And had lunch with him?

A. I don't remember having lunch with him.

Q. Do you remember the occasion of Mr. Zimmerman showing you some gold out there?

A. He never showed me any gold.

Q. Was it not about a week after the time that he showed you this gold when you were out there that you came back?

A. He didn't show me any gold.

Q. About a week after you were there the first time didn't you go out there with McPike.

A. Yes, sir.

Q. What did you do out there at that time with Mr. McPike with reference to this ground?

(Testimony of James Funchion.)

The WITNESS.—If you want me to show anything you better turn around so the Court can see it, too.

The COURT.—I can understand; proceed.

(By Mr. McGINN.)

Q. What did you do with reference to that stake that you claim you established there in 1902?

A. I cut that line out, the trail, right out through. (Referring to plat.)

The COURT.—That red line? A. Yes, sir.

Q. Did you do anything about that corner stake there?

A. There was a whole lot of writing done around that stake there and I marked the corner of Six back on it. Here on this side, that is the side where the first location was, on the side next to the creek, that I never touched. It was all obliterated. I didn't want any more mistakes around there and I wrote our corner back on the upper side of the stake.

Q. What did you do to it? That is all you did to it?

A. I blazed the side off a little where there was some writing on it.

Q. Did you cut anybody's name off that stake?

A. I couldn't make out whose name was there.

Q. There was somebody's name there?

(Testimony of James Funchion.)

A. Yes, sir.

Q. You effaced the markings on that stake at that time? A. It was my stake; I put it there.

Q. You cut off the markings upon that stake at that time?

A. Yes, I made that fresh so I could write our location back on there, but I never touched the side where our location had been.

Q. If it was there why did you want to put it on again?

A. Because it was obliterated and it couldn't be made out and they were doing an awful lot of staking around there at the time and I wanted to make it plain to everybody that that was the corner stake.

Q. You couldn't make it out at all in April and May, 1905? A. No, sir.

Q. The writing had faded away?

A. Yes, sir, it was all faded.

Q. Was it covered up?

A. No, it was not covered.

Q. It had faded away? A. Yes, sir.

Q. And you couldn't see the writing on there?

A. You couldn't make it out, but I could tell that was our stake.

Q. But you couldn't make the writing out?

A. No, you couldn't make it out plain because it was faded.

(Testimony of James Funchion.)

Q. You went to work and cut off the writing that you saw on the uphill side of that stake?

A. Not the uphill side; it was the upstream side.

Q. You cut that off and wrote your own name on it and that you claimed that as the corner stake?

A. Yes, sir. I wanted to make it plain to everybody that that was our stake. I had a right to do as I pleased with that stake because I put that stake there.

Q. So there was nothing upon that stake when you went out there in April, 1905, to indicate that that was your stake.

A. Yes, sir, our location notice was there yet.

Q. On what?

A. On the front side, towards the creek.

Q. You said it couldn't be read.

A. I told you it was dim.

Q. Didn't you just tell us it couldn't be read at that time? A. You couldn't read it.

Q. It couldn't be seen?

A. No, you couldn't read it.

Q. It was faded? A. Yes, sir.

Q. And it couldn't be read?

A. Anybody examining it could tell that that was our stake.

Q. How could they when you say the writing had faded away? A. Yes, sir, it had faded.

(Testimony of James Funchion.)

Q. How could anybody, then, read it?

A. At the time Mr. Zimmerman staked it could have been read.

Q. You didn't see it, then, did you?

A. No.

Q. You didn't see it in September or May, 1904?

A. No. But that was the only tree that was there, the only large tree that there was.

Q. There was no tree out there about the point indicated upon this map, Defendant's Exhibit "B," for the purpose of identification, at the point "C" and near where Mr. Zimmerman has established his corner?

A. There is a little bit of a tree with the top cut off of it.

Q. Who established that?

A. I don't know. Mr. Wilson staked a fraction and put a fraction down here.

Q. There is a stake there, is there not?

A. I wouldn't call it a stake.

Q. What is it?

A. A little bit of a tree about an inch through.

Q. About how high from the ground?

A. About four feet.

Q. Is it cut off? A. Yes, sir, it is cut off.

Q. And blazed? A. And blazed.

Q. And there is writing on it?

(Testimony of James Funchion.)

A. No, I never seen any writing upon it.

Q. About how far is that stake from the lower center stake? A. Up there some place.

Q. About 345 feet, is it not?

A. Something like that.

Q. There is a blazed line that runs up to that stake, is there not?

A. No, sir, the only blazed line was run right out to our stake.

Q. Answer yes or no.

A. No, I never saw any blazed line.

Q. You didn't run any blazed line to that stake?

A. No, I ran it out to our own stake.

Mr. McGINN.—That is all.

Redirect Examination.

(By Mr. CLAYPOOL.)

Q. Coming back to the work done on the claim in 1905, who did the representation work?

A. Bill Owens.

Q. What did he do?

A. He done the representation work there.

Q. To the full value? A. Yes, sir.

Q. And was paid for it by you?

A. Yes, sir.

Q. You said something in your former examination about going down there from the initial post and doing some panning? A. Yes.

(Testimony of James Funchion.)

Q. You may state to the Court what panning you did, and where?

Mr. McGINN.—We object as immaterial.

The COURT.—What is the purpose of it?

Mr. CLAYPOOL.—I want to show what he found there.

Mr. McGINN.—They testified they found a cent in 1903 and that is before any of our rights accrued.

The COURT.—Objection overruled.

Mr. McGINN.—We except.

(By Mr. CLAYPOOL.)

Q. State what panning you did?

A. I panned there in a frying-pan and found some colors in the gravel.

Q. That is all? A. That is all.

Q. It was in the creek gravel?

A. It was in the creek gravel, yes, sir.

Q. The post that you referred to as being the lower end of the claim and marked here on Defendant's Exhibit "B" as "E" you may state what that post was in the first place? A. Which post?

Q. The post between Five and Six at the lower end.

A. That was the lower center stake of Six.

(Testimony of James Funchion.)

Q. Was it not the upper center post?

A. Yes, it was the upper center post of Five Claim.

Q. Put there by whom?

A. By Herbert Wilson.

Q. By Herbert Wilson in staking Five?

A. Yes, sir.

Q. Did you stake down from Seven?

A. Yes, sir, I staked down from Seven.

Q. When you next visited the upper end of this claim at the post you claim as your initial post, how could you identify it; what was there, if anything, peculiar about this upper center or initial post that enabled you to identify it as such?

A. Because it was a large tree, I tried to pick all big trees for all my stakes.

Q. Could you identify it by anything further?

A. The writing.

Q. Or anything else?

A. I could identify it by the writing.

Q. What particular writing on it enabled you to identify it with certainty?

A. The location notice.

Q. Do you remember whether Mr. Wilson wrote for you the name of Ross?

(Testimony of James Funchion.)

A. Yes, sir, he wrote it in large letters "John Cameron Ross."

Q. He wrote it in large letters "John Cameron Ross"? A. Yes, sir.

Q. That has remained there?

A. Yes, sir, that has remained there.

Q. Up to how late?

A. It is there yet because it was a dry tree, and writing on a dry tree don't obliterate as quick as it does on a green one, and that tree was dry.

Q. How late did you visit this post?

A. This fall.

Q. You and I visited it later, did we not?

A. Yes, sir.

Q. When was that?

A. Four or five days ago.

Q. And the notice was still there?

A. Yes, sir.

Q. And this big writing was on it as you stated?

A. Yes, sir.

Q. Now, coming to the corner marked on this Defendant's Exhibit as "A," you have stated that that is also a tree?

A. Yes, sir, that is a tree.

Q. How large a tree is it?

(Testimony of James Funchion.)

A. About 4 inches, I should judge, and down at the butt it may be more. It is the only large tree that is there.

Q. All the rest are little small affairs?

A. All the rest are little small affairs, that is why we used it for the corner because it is the only large tree that is around there.

Q. Are there any large trees at all in the immediate vicinity?

A. No, sir, there ain't a tree around there within a hundred feet of that tree that would be fit to make a stake out of.

Q. There are some other stakes placed right near this?

A. A lot of stakes-posts all around that corner.

Q. None of them are trees?

A. No, that is the only tree that was fit to make a stake out of. It is a large one.

Mr. CLAYPOOL.—That is all.

Mr. McGINN.—That is all.

HERBERT E. WILSON, a witness called on behalf of plaintiffs, having been sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. State your name, Mr. Wilson.

(Testimony of Herbert E. Wilson.)

A. H. E. Wilson.

Q. Herbert E. Wilson.

A. Yes, sir.

Q. You live in the Fairbanks District?

A. Yes, sir.

Q. Are you acquainted with Mr. Funchion? One of the plaintiffs?

A. Yes, sir, I am well acquainted with him.

Q. Are you acquainted with the property in controversy known as No. 6 Above Discovery on Dome Creek? A. Yes, sir.

Q. You may state when you first had anything to do with that property, if you had anything to do with it? A. September 17th.

Q. 1902? A. 1902.

Q. Were you on the property at that time?

A. I was, sir.

Q. Who was with you?

A. Jimmie Funchion.

Q. You may state to the Court, Mr. Wilson, what you and Mr. Funchion did with reference to this property at that time?

A. Mr. Funchion and I staked Five and Six Above Discovery on Dome.

Q. You were assisting him in staking Six?

A. Yes, sir.

Q. And he assisted you in staking Five?

(Testimony of Herbert E. Wilson.)

A. Yes, sir.

Q. Who did the writing on the posts on this claim No. 6, generally speaking?

A. The center posts?

Q. Yes, sir. A. I did.

Q. Where did Mr. Funchion place his initial post?

A. On the upper line on the upper post.

Q. Indicate on Defendants' Exhibit "B"?

A. Right here (showing) where the letter H appears.

Q. What kind of a stake is that, Mr. Wilson?

A. It is a large spruce tree.

Q. About how much in diameter?

A. About eight inches, eight or ten inches, I guess.

Q. At the time it was adopted as the initial post was it a dry or green tree?

A. If I remember right it was fairly dry.

Q. What did you do to that post, and with it?

A. We faced it off and wrote the location notice on the down stream side.

Q. What did you write on the down stream side, as nearly as you can remember?

A. Dated it and claimed twenty acres for placer mining purposes. I wrote everything but Funchion wrote his signature on it.

(Testimony of Herbert E. Wilson.)

Q. You wrote Mr. Ross' name? A. I did.

Q. In that manner? A. John Cameron Ross.

Q. By?

A. By his attorney James Funchion, Funchion put his own name on.

Q. Do you remember anything else on that notice at that time?

A. He described the location notice; twenty acres of placer mining ground, 1320 feet downstream.

Q. Anything else? A. No.

Q. What did you do at that time, if anything, about the stake marked "A" on Defendants' Exhibit "B"?

A. Well, I put that stake out, that lower right limit corner stake.

Q. What was it, Mr. Wilson?

A. It is a tree.

Q. Of what size? A. About four inches.

Q. What did you do with it?

A. I wrote the corner notice on it "upper corner of Five" and "lower corner of Six."

Q. Are there any other trees in that vicinity?

A. Yes, very small ones.

Q. Are there any stakes nearly as large as this particular tree?

A. No, that is the largest tree right around there.

Q. Have you seen it recently?

(Testimony of Herbert E. Wilson.)

A. I saw it this summer, yes.

Q. It is still there? A. Yes, sir.

The COURT.—Had you seen it at any time between the time you put it out and this summer?

A. I never took any notice of it. My attention was called to it this summer, and I took notice of it this summer.

Q. Did you see your writing on it?

A. I saw "Dome Creek," but the top of the tree was cut off.

Q. What I want to know is, could you have made any mistake about it? A. No, I don't think so.

Q. You are positive about it?

A. My handwriting is on there saying "Dome Creek." But I couldn't see the rest because somebody had cut it off.

Q. There is another corner stake below where this is. Did you examine that?

A. No, I didn't pay any attention to that.

By Mr. CLAYPOOL.—For what purpose was this particular stake at "A" used, at that time?

A. For the upper corner of Five, right limit.

Q. Who, staking claims in that immediate vicinity, used this stake as a corner besides you and Mr Funchion, if anybody?

(Testimony of Herbert E. Wilson.)

Mr. McGINN.—We object as immaterial.

(Objection overruled. Defendants except.)

A. I believe Mr. Bush did.

Mr. McGINN.—We move that that be stricken out.

The COURT.—Yes. He may state if he knows.

Mr. CLAYPOOL.—You know about that?

A. I know that was supposed to be the corner.

Q. Was Mr. Bush's notice on there?

A. No, I didn't see it.

The COURT.—Then he cannot state.

Mr. CLAYPOOL.—I don't want anything he cannot state of his own knowledge.

Q. After you had placed this stake which was still there, you say, in the summer, what did Funchion do, if you know?

A. Mr. Funchion went up the center line.

Q. Toward the other corner?

A. To the upper center stake, to his initial stake?

Q. After coming back from there I want you to state to the Court what he did with reference to this corner marked here as "F"?

A. Well, Mr. Claypool, I don't think we wrote on there at all; after I had staked Seven, we came back and took up the sidehill.

(Testimony of Herbert E. Wilson.)

Q. After this was done, what did Mr. Funchion do, if anything, about the corner marked here "F" upon the same exhibit?

A. I don't know what Mr. Funchion did; Funchion went up there alone.

Q. State to the Court what is the character of the surface from this lower post marked "E" up to "F"?

A. It is on the extreme left limit, and there is quite a raise of a hill.

Q. You go down toward the creek?

A. Yes, sir, and then you go up.

Q. Up on the side hill? A. Yes, sir.

Q. What is the character of the ground as to being easy to estimate from "F" to "G"? Have you been up there, do you know?

A. Yes, I have been on that side hill, and it would be pretty hard to say.

Q. It is precipitous in places, and hilly?

A. Yes, sir, it is.

Q. Who owns Five Bench with reference to this property? A. I am supposed to.

Q. You do own it?

A. If Barnette don't, I do.

Q. You claim it?

A. I claim it, you bet.

(Testimony of Herbert E. Wilson.)

Q. This post marked here at the corner "A"; what relation does that bear now to your bench that you have just mentioned?

Mr. McGINN.—We object to that.

The COURT.—What post is that?

Mr. CLAYPOOL.—That is the disputed post.

Mr. McGINN.—That leads us into another suit.

The COURT.—I suppose they want to show that that was a common corner.

Mr. CLAYPOOL.—That is correct.

The COURT.—Objection overruled.

Mr. McGINN.—We except.

The WITNESS.—It is the same corner.

(By Mr. CLAYPOOL.)

Q. You may state if, as a matter of fact, it would be to your advantage if that corner—

Mr. McGINN.—We object to that as suggestive.

The COURT.—That is an argument; objection sustained.

Mr. CLAYPOOL.—Q. Are you positive that that writing "Dome Creek" is the same writing that you put on there at the time of the location of this claim No. 6, in your handwriting?

(Testimony of Herbert E. Wilson.)

A. Yes, sir.

Q. The corner marked "A" on this Defendant's Exhibit "B"?

A. The lower right limit corner.

Mr. CLAYPOOL.—That is all.

Cross-examination.

Q. When did you see that?

A. I saw it this summer.

Q. And you say that the stake had been cut off?

A. It is a tree.

Q. And had been cut off?

A. There is. On the upstream side, and on the other side someone cut some writing off.

Q. Some of the writing you put on?

A. No, I don't think so.

Q. What become of the rest of the writing that you placed upon that stake? A. I don't know.

Q. You wrote "Dome Creek" upon it, did you not?

A. I wrote "lower corner" and "upper corner" on it.

Q. You couldn't see that upon the stake when you were out there? A. No.

Q. The only thing you saw was "Dome Creek"?

A. I will tell you how I account for that: The weather would have something to do with it, and the

(Testimony of Herbert E. Wilson.)

side toward the creek was very smooth; I had planed that very smooth, and my writing "Dome Creek" was very distinct.

Q. All the other had disappeared?

A. I might have found that with a glass, but I didn't see it; I didn't notice it.

Q. And you say that you established that stake there in 1902? A. In September, the 17th.

By the COURT.—Q. Are you satisfied it is the same stake?

A. I am satisfied it is the same stake, yes, your Honor.

Mr. McGINN.—Q. Was there a line blazed at that time?

A. There was, blazed out to the corner, yes.

Q. Where does that blazed line lead to?

A. To the corner.

Q. You mean to say it leads to the corner indicated upon that plat, Defendants' Exhibit "B," to the point indicated by the letter "A"?

A. It goes from the center stake to the corner stake.

Q. Does that blazed line run from the center stake to the point indicated upon the plat by the letter "C"?

(Testimony of Herbert E. Wilson.)

A. I told you I never took any notice of this "C."

Q. Did you know there was a stake there besides Mr. Zimmerman's?

A. I never took any notice of that stake.

Q. Did you notice that there was any writing upon that stake to the effect that that was the lower corner of No. 6? A. No, sir.

Q. You didn't examine that stake?

A. No, sir. The other is the corner of Six.

Q. You staked a fraction there, didn't you?

A. I did; yes, sir.

Q. When was that?

A. Sometime along in 1904.

Q. After Mr. Zimmerman had staked his bench claim?

A. I think it must have been after.

Q. What did you claim at that time?

A. I claimed a strip between the creek and the bench.

Q. Did you see the stake up there at that time that is now in controversy in this case and indicated upon the plat by the letter "A"?

A. Yes, sir, the original corner.

Q. Did you see the name of McQuillan upon that stake? A. No.

Q. Did you examine the stake at that time?

(Testimony of Herbert E. Wilson.)

A. No, just recognized it as the corner.

Q. What did you write upon the upper center stake? You stated in your direct examination that you claimed twenty acres for mining purposes and 1320 feet downstream? A. Yes, sir.

Q. That was all that was written on it?

A. I dated the stake and claimed twenty acres of placer mining ground.

Q. Did you write upon the lower center stake?

A. I did, yes, sir.

Q. What did you write upon it?

A. I wrote very much the same as I did on the upper.

Q. Didn't you write on that stake that you claimed 1320 feet upstream and 330 feet on each side?

A. I don't know whether it was 330 feet on each side of the center, or whether it was 660 feet wide; I forget what I did write.

Q. Have you examined that stake lately?

A. No, sir.

Q. You are positive that you wrote on that lower center stake for Funchion?

A. On both the center stakes, yes, sir.

Q. Funchion didn't write that himself?

(Testimony of Herbert E. Wilson.)

A. Funchion did not. My stake was the initial stake of Six, and the upper one of Six was for Funchion.

Mr. McGINN.—That is all.

Redirect Examination.

Mr. CLAYPOOL.—Q. You mean by that to say that the stake to which counsel has just referred was the initial stake of Five, and that the upper stake of Six was the initial stake of Six for Mr. Funchion?

A. Yes, sir.

The COURT.—In other words, that that center stake was a common stake between Five and Six.

A. A common stake, yes, sir.

Mr. CLAYPOOL.—Both claims were staked downstream from their upper lines? A. Yes, sir.

Q. Did you and Funchion pan on the creek at that time?

A. Yes, sir, we stayed there three days.

Q. What panning did you do?

A. We panned on Five and Six.

Q. What panning did you do on Six?

A. Oh, I did a little panning in the creek; all we had was a frypan.

Q. Did you find anything?

A. Yes, sir, we found gold.

(Testimony of J. J. McDermott.)

Mr. CLAYPOOL.—That is all.

Mr. McGINN.—That is all.

J. J. McDERMOTT, a witness on behalf of the plaintiffs, after being sworn, testified as follows:

Redirect Examination.

(By Mr. CLAYPOOL.)

Q. State your name. A. J. J. McDermott.

Q. Where do you live. A. I live at Chena.

Q. You are a miner? A. Prospector.

Q. You live in the Fairbanks District?

A. Yes, sir.

Q. How long have you mined in this district?

A. I came up here in 1902.

Q. Are you acquainted with Mr. Funchion, one of the plaintiffs? A. Yes, sir.

Q. About how long have you known him?

A. I think I met him in about 1899.

Q. And you have known him ever since?

A. Yes, sir.

Q. Are you acquainted with the property known as No. 6 Above Discovery on Dome Creek?

A. I know of that claim there.

Q. When did you first have anything to do with this property?

A. I never had anything to with that property.

(Testimony of J. J. McDermott.)

Q. When did you first have anything to do with any property adjacent to it or lying near it?

A. In 1903.

Q. What time of the year?

A. Along about the last of December.

Q. You are acquainted with Mr. John Bush?

A. Yes, sir.

Q. Was he with you at that time?

A. Yes, he was representing on the creek the same time I was over there.

Q. What did Mr. Bush, or what did you and Mr. Bush do with reference to No. 5 bench at that time?

Mr. McGINN.—We object to that as immaterial.

(Objection overruled. Defendants except.)

A. We located it, John Bush located No. 5 bench.

Q. And you were with him? A. Yes, sir.

Q. You may look at that (handing to witness).

A. My eyesight is pretty bad, and I can't see without my glasses, and I ain't got them.

Q. Where did you establish the corner of No. 5 bench with reference to the corner of No. 6 creek claim?

Mr. McGINN.—We object to that as it is not shown that he is acquainted with No. 6 creek claim.

(Objection overruled. Defendants except.)

(Testimony of J. J. McDermott.)

A. We went to the center stake of Five and Six. We were representing down there on the creek, and we went to the center stake of Five and Six and followed the blaze through there to the corner.

Q. What did you find there by way of a corner?

A. We found a stake, a tree, a little tree.

Q. A tree of what size?

A. Probably between three and a half to four inches through.

Q. Do you remember what was written on it?

A. As near as I can remember, there wasn't anything on it only "corner stake of creek claim Five," and on the other side of creek claim Six.

Q. Did Mr. Zimmerman, one of the defendants, have bench claim Six staked at that time?

A. There was no benches staked along there at that time..

Q. What use did you and Mr. Bush make of this corner that you found?

A. We made a corner stake of Mr. Bush's bench claim.

Q. Had you any difficulty in tracing the line from the center post you have described as between Five and Six up to this corner post that you found?

A. Well, no; there was a kind of a blazed trail through.

Q. There were blazes leading directly to it?

(Testimony of J. J. McDermott.)

A. There was a blazed trail leading to it, it was not very plain, but we followed it.

Q. What, if anything, did Mr. Bush write on this stake which he took as the corner of his bench?

A. I cannot remember whether he wrote on it corner stake of the bench claim, or——

Q. You don't remember the exact wording of whatever notice he made there?

A. No, sir.

Q. He did write on it?

A. He, wrote on that as the corner stake, anyway, of his bench claim; and he used it as the corner stake of his bench claim.

Q. What was the number of his bench?

A. No. 5 bench claim.

Q. Have you been on Dome Creek since that time?

A. I was over on Dome Creek about five or six weeks ago.

Q. Did you make any examination of this property?

A. I was to that stake.

Q. You went to this corner stake?

A. I went to all the corners and centers.

Q. What did you find with reference to this corner of the Five bench which you and Mr. Bush staked?

(Testimony of J. J. McDermott.)

A. I found a stake there, a whole bunch of these stakes. There are stakes all around there now.

(Here the court takes a recess until 1 P. M. this afternoon.)

Afternoon Session.

November 21st, 1906, 1:30 P. M.

J. J. McDERMOTT here resumes his testimony.

(By Mr. CLAYPOOL.)

Q. Did you find the stake at which Mr. Bush had used originally, which was a tree?

A. Supposed to be the same one.

Q. The same tree?

A. The same tree there.

Q. You found the stake?

A. Yes, sir.

Mr. McGINN.—We object to the question as leading.

Mr. CLAYPOOL.—You may state in your own way what you did find there in the way of stakes?

A. Well, when I went out last time I found the old original stake there with a lot of new stakes close around it.

Q. How did you know this to be the old original stake?

A. Well, it was just the same stake that we used when we located Bush's claim.

(Testimony of J. J. McDermott.)

Q. How do you know that?

A. Well, all I could say about it was that it looked just like the same stake, and was about the same place, stepping from, coming up from, the center stake.

Q. What was it, a tree or a stake, driven in the ground?

A. It was a tree cut off, I should judge, about four and a half feet high, in that neighborhood.

Q. Was there any other stake or other stakes in that immediate vicinity that were of the same character, a tree of that kind?

A. Not at that time; not when we were staking.

Q. Well, later on, were there any trees of that size?

A. No trees of any size. There are a lot of little scrubby trees, probably some an inch and a half, but none of any size outside of this stake that we used for this corner.

Q. Did you observe anything on it that you recognized as having been there before?

A. I didn't.

Q. You didn't take notice of that?

A. No, I didn't; my eyesight isn't very good and without glasses I could not recognize anything on it.

Mr. CLAYPOOL.—Take the witness.

(Testimony of J. J. McDermott.)

Cross-examination.

(By Mr. McGINN.)

Q. You didn't see anything upon that stake that indicated that that was the stake that Bush wrote on in 1903?

A. No, I didn't see anything on it.

Q. There was no writing that you saw on that stake when you were out there about five or six weeks ago that was on that stake in 1903 when you were out there?

A. As I said before, I could not recognize handwriting, that is to make out what it was, because it was stained in such shape that I couldn't make it out without glasses, and I presume I couldn't if I had glasses because it was all blurred over.

Q. There was no writing that could be read at that time upon that stake?

A. Not that I could read.

Q. You can see fairly well?

A. No, sir, I cannot.

Q. Could you in 1903? A. I could.

Q. Did the stake have the appearance of having been recently blazed?

A. Not recently, only a chip off of one side, a little bit of a chip off of one side.

Q. When did that appear as though it had been done?

(Testimony of J. J. McDermott.)

A. That I couldn't say. When a tree gets old or a tree stands for two or three years, you can take a blaze off of that stake and it will look kind of fresh for a year or two, a dry tree.

Q. Was there any writing on that, that you saw?

A. There was some writing on it, but I couldn't make out what it was.

Q. How do you determine that this was the stake?

A. Well, if you want the commencing of it: At the time that Bush and me run up from the center stake of this claim we followed this trail up to this corner stake, which was of Five and Six corner stake, and I got to joshing Bush then, not thinking or having any idea that there was anything in the country. I got to joshing Bush about a raise of ground above it and told him to move up the creek if he wanted to get a nice residence; and the hill ain't moved since I was there first.

Q. Where was this stake with reference to that hill?

A. It was probably a couple of hundred feet from the stake.

Q. In what direction?

A. Up the hill.

Q. How far was this stake from the lower center stake of No. 6?

(Testimony of J. J. McDermott.)

A. Well, this stake from the lower stake, of course——

Q. How many feet was it?

A. From his center stake up to that corner?

Q. Yes? A. I didn't step it.

Q. About how far was it?

A. I judge, of course, that it was over 330 feet.

Q. How much over 330 feet?

A. I couldn't say.

Q. Was it about 345 feet?

A. It would be more nor that.

Q. How much more?

A. It might be 400, it might be. The snow was deep at that time.

Q. At the time you were out there, the snow was deep?

A. No, at the time we went through on the line, the time we located this claim.

Q. Can you see the map over here?

A. I can see those large lines.

Q. You say that the blazed line that was cut out or blazed on the lower end of this claim went to a stake? A. Yes, sir.

Q. And stopped there?

A. And stopped there.

(Testimony of J. J. McDermott.)

Q. And so, if it appears that the blazed line, or line from the point "G" on this map—"G" was the stake that you saw?

Mr. CLAYPOOL.—Hold on, he has not seen "G" yet.

A. I don't know where "G" is on the map.

Mr. McGINN.—I think that is "C" rather than "G".

Mr. CLAYPOOL.—I think it is.

The COURT.—It appears that the witness does not know anything about that.

Mr. McGINN.—It is the letter "C." When were you first on Dome Creek? A. 1903.

Q. With Mr. Bush?

A. Well, I was there by myself when I first went over there, but Bush was on the creek.

Q. When were you first on this property?

A. In 1903.

Q. With Bush? A. With Bush.

Q. Was that the first time? A. Yes, sir.

Q. What is your business now?

A. Prospector.

Q. Where have you been prospecting?

A. Well, you don't want me to tell you of the beginning, do you?

(Testimony of J. J. McDermott.)

Q. Not from the beginning of the world, no.

A. I am over here on Goldstream.

Q. How long have you known John Bush?

A. That was the first time I ever met the man.

Q. How long have you known Mr. Funchion?

A. Since '98 or '99 I first met him.

Q. How long have you known Mr. Wilson?

A. I don't know. I met them there on the creek in 1903.

Q. Are you interested with Mr. Funchion in any way? A. No, sir, I am not.

Q. Where are you prospecting on Goldstream?

A. On 17.

Q. How long have you been there?

A. I went there last winter.

Q. Whose claim is that?

A. It is supposed to be mine.

Q. Do you claim it? A. Yes, sir.

Q. You yourself don't own any property with Mr. Funchion? A. No, I do not.

Q. Are you connected with him in business?

A. No, sir, I am not.

Q. You live at Chena now?

A. That is where I make it my home.

Q. How long have you been living there?

A. Well, I have lived there since 1902.

(Testimony of J. J. McDermott.)

Q. What have you done since prospecting out here on 17 Goldstream?

A. I have been rustling for a grubstake when I was out of grub. You have naturally got to have a little grub when prospecting.

Q. After being out there on Dome Creek in 1903, when were you next there? A. This fall.

Q. That is the first time? A. Yes, sir.

Q. Who requested you to go out there?

A. I went out there with Mr. Funchion.

Q. Did Mr. Funchion point out any of these stakes to you?

A. No, he wanted to know if I could find them.

Q. And you went right to them?

A. When I got to the center stake I went to the corner.

Q. Had you any difficulty in doing it?

A. There is no difficulty in finding them now, that is a fact.

Q. And the ground out there appeared just the same to you six weeks ago as it did in 1903?

A. Not exactly the same because there was no snow on it when I was there this time and there was 3 or 4 feet of snow when I was there before.

Q. That was about the only difference?

A. That is about all.

Q. The timber appeared just about the same?

(Testimony of J. J. McDermott.)

A. What wasn't cut off.

Q. Is there very much cut off now?

A. There appears to be quite a bit.

Q. How was it in 1903?

A. There was not any.

Q. When were the side lines of this claim slashed out?

A. There was lines slashed out all over there.

Q. There was quite a difference in the appearance of the country?

A. In the cutting of the timber.

Q. That makes a difference in the appearance of the country?

A. That makes a difference in the appearance of the country.

Q. How long were you there in 1903?

A. I was there about 20 days.

Q. How long were you upon this claim?

A. Which claim?

Q. Upon this No. 6 or upon No. 5?

A. I wasn't on them only just the day we staked it and to make two or three trips over it afterwards.

Q. You just walked across it at that time?

A. Yes, sir.

Q. You were with John Bush when he established his corner stake? A. Yes, sir.

Q. How long did that take him?

(Testimony of J. J. McDermott.)

A. It took us probably half a day.

Q. To establish the corner stake?

A. No, locate the claim.

Q. I am asking you about this corner stake.

A. All the time it took us at the corner stake was while he was writing his notice on it.

Q. What did he write on it?

A. "Corner stake."

Q. Is that all? A. That is about all.

Q. Did you see anything else written on that stake?

A. I seen corner stake of two other claims.

Q. What others? A. Five and six.

Q. It only took a few minutes to write on that stake, didn't it? A. That is about all.

Q. You never saw that stake again until about six weeks ago? A. No, sir.

Q. And yet, while you couldn't recognize any writing or see any writing on that stake, you are able to go out there and say: "this is the stake" just from your recollection? A. Yes, sir.

Q. You have no interest in this at all?

A. No, sir.

Q. And the appearance of the country has been considerably changed during the time, owing to the fact that the timber has been cut down around there? A. Yes, sir.

(Testimony of J. J. McDermott.)

Q. How does the trail run along there with reference to this claim with reference to this stake?

A. When?

Q. Now.

A. Well, there is trails running all around it and right close by it.

Q. The main trail?

A. I don't know what is called the main trail. You can come up from the center stake to it; there is a blazed trail, and when I was out there it was pretty wide.

Q. I mean the trail going down the creek?

A. Yes, sir.

Q. Where do you go?

A. You go right close by the stake on the trail that I took.

Q. How did you go there? A. When?

Q. In 1903? A. There was no trail.

Q. There was no trail at all there then?

A. No.

Q. You are sure of that?

A. Yes, I am sure of it.

By the COURT.—How far does that claim lie from the town of Dome?

Mr. CLAYPOOL.—The town of Dome is about Discovery, and this is Six Above.

(Testimony of J. J. McDermott.)

Mr. McGINN.—That is all.

Redirect Examination.

(By Mr. CLAYPOOL.)

Q. Do you know where John Bush is now?

A. I don't know.

Mr. CLAYPOOL.—That is all.

Mr. McGINN.—That is all.

Mr. CLAYPOOL.—Counsel, I presume, will not make any objection to that point?

Mc. McGINN.—Mr. Bush is out of the country.

Mr. CLAYPOOL.—And so is Mr. Ross.

Mr. McGINN.—I understand so.

Mr. CLAYPOOL.—They are both clients of yours?

Mr. McGINN.—Yes, sir.

Mr. CLAYPOOL.—And they are both out of the country?

Mr. McGINN.—They are both out of the country.

JOHN McPIKE, a witness on behalf of plaintiffs, being duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name? A. John McPike.

Q. You are acquainted with Mr. James Funchion, one of the plaintiffs? A. Yes, sir.

Q. How long have you known him?

A. About ten years, I guess, or eleven years.

A. Are you acquainted with the property that is in controversy here, No. 6 Above Discovery on Dome Creek? A. Yes, sir.

Q. You know Mr. Zimmerman, one of the defendants? A. Yes, sir.

Q. When did you first see that property?

A. 1904.

Q. In the summer? A. No, in the winter.

Q. What time of the year?

A. In December.

Q. In December, 1904, was the first time you visited it, and who was with you?

A. I was there alone myself.

Q. Did you observe anything at that time about the stakes or markings on the ground?

A. Yes, sir.

(Testimony of John McPike.)

Q. What did you find in the way of stakes or marks on this claim No. 6 Above Discovery at that time.

A. I only seen one stake there, the trail that I used to go down to the claim where I was working ran right close to this lower corner on the right limit—

Q. Which corner was that?

A. It was the right limit corner of Six.

Q. On the right limit? A. Yes, sir.

Q. Did you see any stake there at that time?

A. Yes, sir.

Q. Did you make any examination of it, look at it? A. Yes, sir, I looked at it.

Q. Do you remember what was on the stake, then, or anything that was written on it?

A. "Lower corner of Six right limit."

Q. Anything else?

A. That is all I remember.

Q. Anything about Five that you noticed?

A. There was Five on the lower side of it.

Mr. McGINN.—We object to all this as leading.

Mr. CLAYPOOL.—Was there, or was there not?

A. Yes, it had been used for the corner of Five.

Mr. McGINN.—We move that that be stricken out as not responsive.

(Testimony of John McPike.)

The COURT.—That is not responsive.

Mr. CLAYPOOL.—Did you see anything else on there, anything at all on there about claim No. 5?

Mr. McGINN.—We object as leading and suggestive.

(Objection overruled. Defendants except.)

A. Yes, it was marked Five on the lower side, corner of Five.

Q. And what on the upper side? A. Yes, sir.

Q. What kind of a monument or stake was this?

A. It was a tree, I believe. It was a tree.

Q. About how large a tree?

A. About four inches.

Q. About how high was it cut off?

A. Between four and five feet.

Q. Were there any other trees anywheres near it?

A. At that time?

Q. Yes? A. No, I didn't notice any.

Q. Did you notice any trees, or were there any trees anywhere near it, of anywhere like the same size?

A. No, there was small brush around close to it.

Q. As a matter of fact isn't it true that that was the only thing in the shape of a tree in that immediate neighborhood?

A. It was the only thing I seen around there.

(Testimony of John McPike.)

Q. How long did you stay on Dome Creek at that time? A. Ten or twelve days.

Q. How often did you pass this stake, or see it?

A. About twice or three times a day.

Q. Was it taken away, or removed, or in any manner interfered with while you were there?

A. No.

Q. Was it there when you left? A. Yes.

Q. Where were you staying at the time?

A. I was staying with Mr. Zimmerman.

Q. In his cabin? A. Yes.

Q. How far was that cabin from this stake that you observed?

A. I don't know whether it is at the middle of this bench or not, but somewhere along there.

Q. The cabin where you lived?

A. Yes, sir, it was Zimmerman's cabin.

Q. What were you and Zimmerman doing at that time? A. I was working on Four Creek claim.

Q. What was he doing?

A. He was working on Five Creek Claim, I believe. I believe it was Five.

Q. Did you have your meals together?

A. Sometimes.

Q. You both ate there in the cabin?

A. Yes, sir.

(Testimony of John McPike.)

Q. Look at this map, Defendant's Exhibit "B" at the point "E" here representing the lower center post. I will ask you to indicate where that would be, that stake to which you referred as you observed it?

(Witness examines plat.)

(Mr. Claypool explains plat to witness generally.)

A. It would be right here (showing).

Mr. McGINN.—Indicate on the plat where he pointed.

Mr. CLAYPOOL.—I understood that he pointed generally. That is the disputed ground there inside of the red line?

Mr. McGINN.—I don't think this is proper cross-examination.

By the COURT.—Do you think you understand the map, Mr. McPike? A. Yes, sir.

The COURT.—Proceed and ask him the questions.

Mr. CLAYPOOL.—As nearly as you can fix it was that stake— You know how the whole ground has been staked over since?

The WITNESS.—It was over here some place (showing).

Q. Near where "A" is? A. Yes, sir.

(Testimony of John McPike.)

Q. You know where Mr. Zimmerman claims his corner to be, do you not? A. No, I don't.

Q. Did you make any examination or observation at that time of any bench marked between the lines shown here as "A" and "E," of any kind?

Mr. McGINN.—We object as leading. Let him testify in regard to the bench line and let him say where it runs to.

The COURT.—Yes.

Mr. CLAYPOOL.—During this time that you were there with Mr. Zimmerman, did he ever say anything to you about this corner stake, or this property?

A. I don't remember of him saying anything about it.

Q. Did he, to your best recollection?

A. No.

Q. How recently have you visited this property?

A. About a week ago.

Q. What did you find as to this upper corner stake concerning which you have testified? Is it there yet, or not. A. Yes, it is there yet.

Q. How do you fix it as being the same stake?

A. Well, it is a tree that has been cut off. There are some more stakes around there close to it.

Q. Are the other stakes, trees, or just stakes set up and some leaning over?

(Testimony of John McPike.)

A. Yes, sir, stakes set up.

Q. Is this the same stake standing there now as the one that stood there when you knew it?

A. It is the same one that was there the first time I saw it.

Q. Were you on this property in 1905?

A. Yes, sir.

Q. Who was with you?

A. Mr. Zimmerman.

Q. What was he doing with you at that time?

A. Well, we were cutting them lines out around the claim.

Q. You assisted him in cutting what lines?

A. Between Five and Six to the corners, on the ends and on the sides, on the right limit.

Q. All around the claim where it was needed to be done? A. Yes, sir.

Q. Where was this corner stake which you have testified was there? At that time was it still there, or not? A. It was still there, yes.

Q. Was there any writing on it that you could remember at that time, that was there in 1905?

A. Yes.

Q. Do you remember what it was?

A. The corner of Six.

Q. The same that was there before that you testified to? A. Yes.

(Testimony of John McPike.)

Q. When you visited the property about a week ago, did you find any difference in the stakes from what they had been before?

A. No. There wasn't so many stakes there the first time I seen it.

Q. There are some stakes around this corner now?

A. Yes, sir.

Q. Was that the only difference you could see?

A. There was a blaze right down on this tree.

Q. When was that?

A. About a week ago, I see that.

Q. A blaze from this tree down to the center?

A. No, a blaze on this here tree.

Q. That was the only difference you noticed?

A. Yes, sir.

Mr. CLAYPOOL.—Take the witness.

Cross-examination.

(By Mr. McGINN.)

Q. You were there with Mr. Funchion in 1905?

A. In 1905.

Q. And you say you saw some writing upon the stake at that time? A. Yes, sir.

Q. Did you see the name of F. X. McQuillan on that stake? A. No.

(Testimony of John McPike.)

Q. Did you see Mr. Funchion blaze that stake and cut off the name of F. X. McQuillan at that time?

A. I don't remember that at all.

Q. Weren't you there with him at that time?

A. Yes, sir.

Q. Do you remember Mr. Funchion writing upon the stake then? A. I won't say that I do.

Q. You heard Mr. Funchion testify this morning?

A. Yes, sir.

Q. You heard him testify that he couldn't see any writing at that time?

A. He could have wrote on the stake independent of me.

Q. You heard him testify that he couldn't see any writing upon the stake, didn't you?

Mr. CLAYPOOL.—We object to that question as it is not what he testified to.

The COURT.—If there is any question about that you may ask the witness what he did see?

By Mr. McGINN.—I asked him if he heard Mr. Funchion testify this morning that he didn't see any writing on this stake?

The COURT.—He may answer that. (Objection overruled.)

(Testimony of John McPike.)

Mr. CLAYPOOL.—Plaintiffs except.

A. Yes, sir.

Q. Yet you say that you saw some writing on it?

A. Yes, sir.

Q. And you did not see the writing of F. X. McQuillan on that stake? A. I didn't notice it.

Q. Did you at that time examine the stake very carefully? A. Not very careful.

Q. You examined it on all sides?

A. Yes, sir.

Q. And if the name of F. X. McQuillan was on that stake wouldn't you have seen it?

A. I don't know.

Q. You didn't assist Mr. Funchion in cutting off that name, did you? A. No, sir.

Q. You helped blaze the lines at that time?

A. Yes, sir.

Q. You blazed what Mr. Funchion now claims to be the upper side line of Six Creek Claim?

A. Yes, sir.

Q. Up to that time it had not been blazed?

A. No.

Q. And you blazed the other lines? A. Yes.

Q. What other lines?

A. The upper end line of Six and the lower end line.

(Testimony of John McPike.)

Q. The upper end line of Six and the lower end line? A. Yes, sir.

Q. Had the lower end line of Six been blazed before that? A. Yes, sir.

Q. Do you know where Zimmerman's stake is about that? A. No.

Q. Didn't you see it when you were out there a week ago? A. I don't know that I did.

Q. You never saw Mr. Zimmerman's stake out there? A. I see some stakes around there.

Q. Yet you were living on that claim with Mr. Zimmerman and don't know where his stake is?

A. The only stake that I have seen there was this corner that we have just—

Q. You didn't see any other stakes?

A. I did not.

Q. You didn't see Zimmerman's stakes?

A. No.

Q. Did you see the other center stake of No. 6?

A. Yes, sir.

Q. Do you know as a matter of fact that the trail went by Mr. Zimmerman's stake?

A. The trail that I used went by this stake in question.

Q. You did the assessment work on No. 4?

A. Yes, sir.

(Testimony of John McPike.)

Q. You know the trail that you used when you went to work down there? A. I do.

Q. Didn't that go right by Zimmerman's stake?

A. No, I went past this other stake.

Q. It did not go by Zimmerman's stake at all?

A. No.

Q. Don't you know that the trail that you took in order to go down to No. 4 followed the line that Mr. Zimmerman had blazed out, and went right down to the corner stake? A. No, I don't.

Q. You never saw this stake there at all?

A. As I have told you, the road that I used passed this stake.

Q. And you never saw Zimmerman's stake at all?

A. (Continuing.)—and passed Zimmerman's work where he was working on Five. I remember his hole there.

Q. Do you know who blazed out that line?

A. No, I don't.

Q. Do you know that Zimmerman did?

A. I do not know that.

Q. So you don't know anything about the cutting of that F. X. McQuillan's name off of that stake there? A. No.

Q. Although you were with Mr. Funchion at the time these lines were blazed out?

(No answer.)

(Testimony of John McPike.)

Mr. CLAYPOOL.—He said cut out.

Mr. McGINN.—I say when you were out there at the time these lines were blazed, or cut out, you say you were there at that time?

A. Yes, sir, I was there. I didn't see this man Funchion cut off anything off of this stake; I told you that before.

Q. How long were you out there then with Funchion? A. Two or three days there.

Q. Did he pay you? A. No, he did not.

Q. What were you doing?

A. I was looking after an interest of my own there at the same time.

Q. In what property?

A. In No. 4 on the creek.

Q. What has 4 got to do with 6?

A. He helped me to do the work on 4 down there and I helped him on 6.

Q. Did you work on 2 also? A. Yes.

Q. There is some dispute down there since that time about the stakes, is there not?

A. I don't know.

Q. You say you were out there in December, 1904?

A. Yes, sir.

Q. And you paid particular attention to this stake? A. Yes, sir.

Q. You had no interest in the matter?

(Testimony of John McPike.)

A. None whatever, no.

Q. And you didn't see that stake from the time that you left there then until about a week ago?

A. Yes, I had been over there once this summer on the creek there.

Q. When was that?

A. Sometime in August, I think.

Q. Of this year? A. Yes, sir.

Q. Prior to that time had you seen the stake since 1904? A. I came down past that way.

Q. You never paid any attention to the stake?

A. I have seen the stake there and came down past that way. The road is running right close to that place, right along there.

Q. You didn't pay any particular attention?

A. I looked over to see.

Q. Did you examine the writing on it?

A. No, I had no interest in examining the writing then.

Q. The only time you examined the writing was in December, 1904, and in April, 1905?

A. That is all.

Q. Where are you working at the present time?

A. Fairbanks Creek.

Q. Are you interested with Mr. Funchion?

A. No.

Q. Are you working for him? A. No.

(Testimony of R. A. Jackson.)

Q. What property are you working on on Fairbanks? A. On 1 Above.

Q. Have you a lay from Mr. Funchion on any property? A. No.

Q. Have you any promise of a lay?

A. No.

Mr. McGINN.—That is all.

Mr. CLAYPOOL.—That is all.

R. A. JACKSON, a witness on behalf of plaintiffs, after being sworn, testified as follows:

Cross-examination.

(By Mr. CLAYPOOL.)

Q. You may state your name.

A. R. A. Jackson.

Q. You are a surveyor?

A. Yes, sir.

Q. Where do you reside?

Q. Do you know Mr. James Funchion, one of the plaintiffs? A. Yes, sir.

Q. You may state if you did some work for him with reference to No. 6 Above on Dome Creek, the property in controversy here? A. I did.

Q. When was that?

A. August, I think, of this year.

Q. August, 1906? A. Yes, sir.

(Testimony of R. A. Jackson.)

Q. You may look at the paper which I now hand you marked exhibit "A," and state what that is.

A. It is a plat that I made for Mr. Funchion.

Q. As a result of that work?

A. Yes, sir.

Q. You may state what you estimated at that time the ground contained in surface area?

Mr. McGINN.—We object as immaterial.

(Objection overruled. Defendants except.)

A. Seventeen and a fraction acres.

Q. You may state whether or not you ever made a survey of creek claim No. 5 Above?

A. I did.

Q. Look at the exhibit 5—don't answer until counsel have an opportunity to object—and at what is marked on this map as N.W. Cor. you may state what, if you remember, you used as the corner of No. 5 on that survey.

Mr. McGINN.—We object as immaterial.

Mr. CLAYPOOL.—I understand Mr. Jackson is put on the stand to show their good faith. Mr. Jackson, when he went out there to survey that claim, wouldn't know anything about the stakes of 6.

The COURT.—Objection overruled.

(Testimony of R. A. Jackson.)

Mr. McGINN.—And it is hearsay.

The COURT.—I do not think Mr. Jackson ought to be asked to state what other people told him, He may state what he did and what he saw.

A. What is the question?

Q. (Question read.)

A. I used a stake marked "Corner of No. 5 Above."

Mr. McGINN.—We move that that be stricken out as immaterial.

(Objection overruled. Defendants except.)

Q. (By Mr. CLAYPOOL.) At this point marked as I have mentioned? A. Yes, sir.

Q. You may state what use you made of that same stake, if any, in the survey you made of this property. A. I used the same stake.

Q. Can you remember now the character of that stake, independently of any information other people gave you? A. I cannot.

Q. Did you mark it? A. Yes, sir.

Q. How did you mark it?

A. I marked it with a blue oil crayon "N.W.Cor No. 6" and signed it.

Q. And put your name on it, "R. A. Jackson, surveyor"? A. Just "Jackson, Surveyor."

Q. In blue oil pencil? A. Yes, sir.

(Testimony of R. A. Jackson.)

Q. (To Mr. McGINN.) Shall I go into his qualifications?

Mr. McGINN.—No.

Mr. CLAYPOOL.—Counsel waives any examination of Mr. Jackson as to his qualifications.

The COURT.—The Court has heard Mr. Jackson's qualifications stated in a number of cases.

Mr. CLAYPOOL.—He admits his qualifications as a surveyor.

Mr. McGINN.—As a competent and qualified surveyor.

Q. (By Mr. CLAYPOOL.) You may state, if you made any recapitulation or further computation according to the lines as indicated on this exhibit "A." A. I did.

Mr. McGINN.—We object as immaterial.
(Overruled; exception.)

Q. (By Mr. CLAYPOOL.) With whom?
A. With Mr. Zugg.
Q. At whose instance?

Mr. McGINN.—The same objection.
(Overruled; defendants except.)
A. Mr. Sale's, one of the plaintiffs.
Q. What was the result of that computation?

(Testimony of R. A. Jackson.)

Mr. McGINN.—The same objection.

(Overruled; defendants except.)

A. Nineteen and a fraction acres.

Q. (By Mr. CLAYPOOL.) You do not remember just the fraction? A. No, I do not.

Q. Did you bring that matter to Mr. Sale's attention?

A. I did. I brought it to Mr. Sale's attention.

Q. Immediately? A. Yes, sir.

Q. After you arrived at that result?

(No answer.)

Q. You informed Mr. Funchion in the first place of the result of your survey?

A. I did by 'phone, yes, sir.

Q. Also delivered to him this plat?

A. Yes, sir.

Mr. CLAYPOOL.—Take the witness.

Cross-examination.

(By Mr. McGINN.)

Q. You do not pretend to know anything about where the original stakes were placed upon that property out there. A. No, sir.

Q. You were governed only by what people told you? A. Yes, that is all.

Mr. McGINN.—That is all.

(Testimony of R. A. Jackson.)

Redirect Examination.

(By Mr. CLAYPOOL.)

Q. You may state to the Court the general character of the ground there as to its being easy to estimate distances and directions or otherwise.

A. Mr. Claypool, when I was first on that ground the end lines were cut out between 6 and 5.

Q. Those lines were not hard to find?

A. No, sir, those lines were not hard to find. It was very heavy scrub spruce in there, I judge, from the character of the stumps standing up.

Q. Where the lines were not cut, what would that indicate.

A. Scrub spruce.

Q. Thickly grown or otherwise?

A. Fairly thick, yes.

Q. As you remember, from this post concerning which you have testified as the corner of 5 and 6, across the creek to the other corner, what is the character of the ground that way?

A. After you get across the creek, it is a very rapid ascent.

Q. A rough piece of ground? A. Yes, sir.

Q. From there, could you see from that stake up stream or up the side where the lines should be?

A. No.

(Testimony of R. A. Jackson.)

Q. You may state from your experience as a surveyor and from your observation whether or not that ground was such ground as would have been easy to estimate straight lines and distances, or difficult.

Mr. McGINN.—We object to that as immaterial.

(Overruled and defendants except.)

A. In any country where the timber is uncut it is difficult to estimate distances or courses in the timber.

Q. And on the hillsides?

A. And on the hillsides.

Mr. CLAYPOOL.—That is all.

Recross-examination.

(By Mr. McGINN.)

Q. You say you went out there in August.

A. Yes, sir, this year.

Q. And the lines of the claim were not cut at that time?

A. The lower end line was cut, and there had been an effort made to cut the right limit side line.

Q. That was all?

A. And part of the upper end line had been cut.

Q. At the time that you went out there was Mr. Zimmerman working upon this property in dispute?

A. Yes, sir, I saw him there and talked to him.

(Testimony of E. G. Allen.)

Q. He had a hole down to bedrock?

A. I assume that he did from the tailings there. I didn't ask him.

Mr. McGINN.—That is all.

Mr. CLAYPOOL.—That is all.

E. G. ALLEN, a witness on behalf of plaintiffs, after being sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. (To Mr. McGINN.) Shall we examine him as to his qualifications?

Mr. McGINN.—I understood that you announced this morning that the map, Defendants' Exhibit "B," was satisfactory to you, and that, while there was a slight discrepancy, you would be governed with the figures on that map.

Mr. CLAYPOOL.—This has nothing to do with that.

Q. State your name.

A. E. G. Allen.

Q. What is your business or profession?

A. Surveyor.

Q. State generally your education, qualifications and experience.

(Testimony of E. G. Allen.)

Mr. McGINN.—We admit he is competent.

Mr. CLAYPOOL.—It is admitted by counsel for defendants that Mr. Allen is a competent and qualified surveyor and a deputy United States mineral surveyor. Is that right?

A. (By Mr. McGINN.) Yes, I suppose so.

Q. (By Mr. CLAYPOOL.) Are you acquainted with Mr. Funchion, one of the plaintiffs?

A. No, sir.

Q. Do you know him when you see him?

A. I don't know that I would know him for Mr. Funchion.

Q. You know Mr. Sale and Mrs. Sale?

A. I know Mr. Sale and I have seen Mrs. Sale.

Q. Are you acquainted with the property known as No. 6 Above Discovery on Dome Creek?

A. Yes, sir.

Q. Did you ever make a survey of that property?

A. Yes, sir.

Q. When was that?

A. On the 22d of October, 1906.

Q. At whose suggestion?

A. Mr. Sale and Mr. Weiss.

Q. Acting for Mrs. Sale? A. Yes, sir.

Q. Look at Plaintiff's Exhibit "A," which I now hand you, and state what that is.

(Testimony of E. G. Allen.)

A. That is a map of the claim 6 Above on Dome Creek.

Q. Made as the result of your survey?

A. Yes, sir.

Q. Did you make any report of your work in that behalf to Mr. Sale?

A. I did, yes, that is, as to the area, and delivered the map.

Q. Is this the map that you delivered?

A. Yes, sir.

Q. What did you estimate the area to be?

A. Twenty-one and seventy hundredths acres.

Q. When was this?

A. When I returned the map to him.

Q. That was the—

A. Three or four days after that; a couple of days after I returned from the creek.

Q. Can you remember the date?

A. I think it was the 25th; three days after I got in and on the 3d day.

Mr. CLAYPOOL.—That is all.

Mr. McGINN.—That is all.

JOHN ZUGG, a witness on behalf of the plaintiffs, after being sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name? A. John Zugg.

Q. What is your business and profession?

A. Civil engineer.

Q. You admit, Mr. McGinn, that Mr. Zugg is qualified the same as the other two witnesses?

Mr. McGINN.—Yes.

Q. (By Mr. CLAYPOOL.) Do you know Mr. R. A. Jackson? A. Yes, sir.

Q. You heard his testimony about computing in common with you the area of No. 6 Above Discovery on Dome Creek according to his plat?

A. Yes, sir.

Q. The one that he referred to?

A. Yes, sir.

Q. You may look at Plaintiffs' Exhibit "A" and see whether that is the plat to which he referred in his testimony.

A. Yes, that is it.

Q. Do you remember the result of your computation?

A. I figured it simply from that plat. I have never been on the ground. I figured it at 20.77

(Testimony of John Zugg.)

acres, as I recollect it. Mr. Sale asked me to calculate the area, and I simply took the map and made the calculation. Mr. Jackson was out of town at that time, and when he returned he found that my calculation was in excess of his, and he figured it over again and notices one or two minor errors in my calculation which possibly changed the result a fraction of an acre.

Q. You had some discussion between you?

A. Yes, sir.

Q. Did you finally agree?

A. I didn't go over my figures again. He called my attention to one or two errors in which he was right, but I didn't figure up the net correction.

Mr. CLAYPOOL.—That is all.

Mr. McGINN.—No questions.

JOHN L. SALE, a witness on behalf of the plaintiffs, after being sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name?

A. John L. Sale.

Q. Are you acquainted with Mr. Allen, the surveyor, who testified a few minutes ago?

A. I am.

(Testimony of John L. Sale.)

Q. Did you employ him to do any work with reference to the claim that is in controversy in this action? A. I did.

Q. On whose behalf were you acting?

A. On my wife's.

Q. One of the plaintiffs in this action?

A. Yes, sir.

Mr. CLAYPOOL.—That is all.

Cross-examination.

(By Mr. McGINN.)

Q. Mrs. Sale is in town here? A. She is.

Q. You have her power of attorney?

A. Not for this specific instance, but I have a power of attorney issued in Dawson several years ago.

Mr. McGINN.—We do not question his authority to act.

JAMES FUNCHION, a plaintiff, recalled on behalf of plaintiffs, testified as follows, to wit:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. You may state whether you are generally acquainted with placer mining properties in this recording district? A. Yes, sir.

(Testimony of James Funchion.)

Q. And have been so acquainted with them for how long? A. Since the camp was struck.

Q. Three or four years? A. Since '02.

Q. In your opinion is the property in controversy in this action worth more or less than $500?

Mr. McGINN.—We admit that it is worth more than $500.

Mr. CLAYPOOL.—That is all then. We ask permission to introduce the deposition of John Bush, and, with that exception we rest. No, I will call Mr. Funchion.

JAMES FUNCHION, plaintiff, resumes his testimony:

(By Mr. CLAYPOOL.)

Q. When you went out to this claim the time that you testified to when you met Mr. Zimmerman and put a new corner stake 129.3 feet from the old corner stake, did you take anything with you in the way of an amended location notice?

A. Yes, sir.

Q. Where did you get that?

A. In your office.

Q. Did I give it to you? A. Yes, sir.

Q. What did you do with it?

(Testimony of James Funchion.)

A. I went out there and posted it; put another stake in there and posted that notice on it.

Q. According to the notice? A. Yes, sir.

Q. 129.3 feet from the old stake?

A. Yes, sir.

Q. When you and McPike and I were there, did we go to where that notice was?

Mr. McGINN.—We object to that as irrelevant, incompetent and immaterial, occurring subsequent to the institution of the action. The plaintiffs must rely upon the strength of the title that they had at the time the suit was instituted.

(Objection overruled; defendants except.)

A. It was right across the creek, right where I had placed it.

Q. Did you make any change in it after I gave it to you?

A. Yes. I marked it "6 above" instead of "6 below."

Q. At whose instance did you do that; who called your attention to that?

Mr. McGINN.—We object as immaterial. (Overruled.)

A. Mr. Frame.

The COURT.—I suppose there is no dispute about that.

(Testimony of James Funchion.)

Mr. McGINN.—He says he did it, and I suppose that is sufficient.

By Mr. CLAYPOOL.—That is all.

Mr. McGINN.—That is all.

Mr. CLAYPOOL.—It was made under my supervision and I will testify that this is a carbon copy with the exception of the change from "below" to "above."

Mr. McGINN.—This is the amended notice?

Mr. CLAYPOOL.—Yes, with the exception of that misrecital, and we offer it in evidence. I will be sworn.

C. E. CLAYPOOL, a witness on behalf of plaintiffs, after being sworn, testified as follows:

Direct Examination.

(By Mr. de JOURNEL.)

Q. What is your business?

A. I am an attorney at law.

Q. You are acting for the plaintiffs in this action? A. Yes, sir.

Q. Did you draw any notice of location in the way of an amendment to the original notice of location of the claim No. 6 above discovery on Dome Creek, creek claim, and if so, when?

(Testimony of C. E. Claypool.)

A. Yes, sir. I drew, or had drawn under my direction by my stenographer, an amended notice of location, what was intended to be such, of date about the 30th of October, I think probably the 29th or 28th, about that time, I cannot state the exact date.

Q. Have you got it with you?

A. I have the original notice with me in my hand.

Mr. de JOURNEL.—We ask leave of the Court to put it in evidence.

The COURT.—If there is no objection—

Mr. McGINN.—We object to it as irrelevant, incompetent and immaterial to the issues in this case, not having been recorded within 90 days from the date of location, and having been recorded long subsequent to the time that it is conceded in this case that the defendant Zimmerman initiated his rights to the property in conflict here; for the further reason that this was all done subsequent to the commencement of this action, and, of course, it cannot in any way aid the title that the plaintiffs had at the time of the commencement of the action. They admit that the claim has an excess, and they now undertake to throw off a portion on the other side. This is all subsequent to the commencement of the

(Testimony of C. E. Claypool.)

action, and they must depend upon the title that they had at the time of the commencement of the action.

The COURT.—There is no question about that. I do not look upon this as anything in addition to the title that they had at the beginning of the action, but as something which they have filed showing their intention to abandon a portion of the ground merely. It may be admitted in evidence and filed.

(Marked Plaintiffs' Exhibit 5.)

Q. (By Mr. de JOURNEL.) Is there any change made?

Mr. McGINN.—We object to that.

Mr. de JOURNEL.—It is the correction of a clerical error.

Mr. McGINN.—This is the notice recorded and has the recorder's mark on it.

Mr. de JOURNEL.—Prima facie that is the record.

Mr. McGINN.—You cannot alter the record by parol proof.

Mr. de JOURNEL.—We wish to show the difference between this one and the notice on the claim.

The COURT.—This one, you say, is corrected?

(Testimony of C. E. Claypool.)

Mr. de JOURNEL.—No, it is not, but we will explain why the one posted on the claim differs from this and in what respect.

The COURT.—Objection overruled.

(Defendants except.)

Plaintiffs' Exhibit 5.

NOTICE AND AMENDED CERTIFICATE OF PLACER LOCATION.

We, James Funchion and Amy Sale, citizens of the United States, hereby certify that we are the owners by purchase from the original locators of that certain placer mining claim situated in the Fairbanks Recording District, Territory of Alaska, Third Division, and further described as being placer mining creek claim number six (6) above discovery on Dome Creek, in the recording district aforesaid. That on the 18th day of September, 1902, John C. Ross, the original locator, by his attorney, James Funchion, duly located the said placer mining claim and on the 29th day of October, 1902, caused a record of said location to be duly entered and filed in the Circle recording district, and that the said location was in the words and figures following, to wit:

"Notice is hereby given that I, the undersigned, has located 20 acres of placer mining ground on

(Testimony of C. E. Claypool.)

Dome Creek in the Circle Recording District, District of Alaska, described as follows: Commencing at a stake bearing location notice and joining No. 7 above discovery, thence down stream a distance of 1320 feet to a stake, thence 660 feet in width of said claim; this claim to be known as No. 6 above discovery on Dome creek.

Located this 18th day of Sept. 1902.

JOHN C. ROSS,
By his Attorney,
JAMES FUNCHION.

Witness:
HERBERT E. WILLSON.

Filed for record Oct. 29, 1902, at 1:30 P. M.
CHAS. ETHELBERT CLAYPOOL,
Commissioner and Ex-officio Recorder.
By J. T. Cowles,
Deputy.

That for the purpose of reducing the area of said claim and for the further purpose of curing any defects and errors in the said original certificate, and any failure to comply with the requirements of law in that respect and with the further purpose of better describing the lines and surface boundaries of the said location as amended, we, the owners, now make and file in the office of the proper recording district at Fairbanks, Alaska, this, our amended

(Testimony of C. E. Claypool.)

certificate of location of the said claim, and that the description of said claim will be henceforth as follows, to wit:

"Creek placer mining claim No. 6 above discovery on Dome creek, the boundaries thereto being substantially as follows: Starting from the initial stake at the upper end of said claim, approximately in the center thereof, thence northerly a distance of 269 feet the northeast corner stake, and from said corner stake thence westerly for a distance of 1313 feet to a stake marked "Lower right limit northwest corner stake" between creek claims No. 5 and No. 6; thence in a southerly direction slightly to the west for a distance of 477.1 feet to another stake marked "West end center stake"; thence in a southerly direction for a distance of 233.8 feet to a stake marked "Lower southwest corner stake"; thence in an easterly direction for a distance of 1311 feet to a stake marked "Southeast corner stake," thence in a northerly direction for a distance of 301.5 feet to the point of beginning.

That we have caused a permanent monument, being a substantial post, to be erected on the lower boundary down stream between the west end center stake and the former southwest corner stake 233.8 feet from the said west end center stake and 129.3 feet from the former southwest corner stake, which

(Testimony of C. E. Claypool.)

said stake will henceforth be our permanent southwest corner stake and is marked "New southwest corner stake of creek claim No. 6 below discovery, amended location," and signed with our names.

That said amended location as above described embraces the original discovery as well as all development work which we have done or which has been performed upon or for the benefit of said original claim, and we thereby claim that this amended certificate of location relates back to the date of the original location and that it is entitled to the benefit of the original discovery as well as all work done or improvements made by our grantors and ourselves within the limits of said amended location, or for the benefit of the original locator.

JAMES FUNCHION.

AMY SALE.

[Endorsements]: Indexed No. 16,604. Notice and Amended Certificate of Placer Location Creek Claim No. 6 Above on Dome. James Funchion and Amy Sale. District of Alaska, Third Judicial Division, ss. Filed for Record at Request of C. E. Claypool on the 3d day of Nov. 1906, at 40 min. past 10 A. M. and Recorded in Vol. 7 of Locs, page 626. Fairbanks Recording District. G. B. Erwin, Recorder. By Henry T. Ray, Deputy. No. 572. In

(Testimony of C. E. Claypool.)

the District Court, Territory of Alaska, Third Division. Funchion vs. Zimmerman. Plaintiffs' Exhibit No. 5. Filed in the District Court, Territory of Alaska, Third Division. Nov. 21, 1906. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

A. On the second page next to the last paragraph, in reciting what is to appear on that post, the word "below" is used, when it should be "above"; it is opposite to what was intended.

The COURT.—In other words, it was said to be below instead of above discovery?

A. It was said to be below instead of above discovery. It is not in the substantive part of the notice, but in the recitals.

Q. (By Mr. de JOURNEL.) And the one posted on the claim?

A. Mr. Frame changed under my directions.

Q. To the word "above"?

A. To the word "above," yes, sir.

Mr. de JOURNEL.—(To Mr. McGinn.) Will you admit that we made a tender of 88 feet prior to changing this notice of location of location on or about the 24th day of October or about that?

Mr. McGINN.—That you came to me and offered some part of the lower part of this claim.

(Testimony of C. E. Claypool.)

Q. (By Mr. de JOURNEL to Mr. Claypool.) Did you, under the directions of your clients, and about the 24th day of October, call upon counsel for defendants and make any tender, and, if so, what?

Mr. McGINN.—We object to the word tender. There cannot be a tender without a deed.

Q. (By Mr. de JOURNEL.) Make an offer?

A. Yes, I offered on behalf of the plaintiffs to convey to them from a line 88 feet up from the center stake.

Q. From which center stake?

A. From the lower center stake straight across. It would leave them their work.

Q. The 88 feet extended up stream from the lower center stake? A. Yes, sir.

Q. For the full width of the claim?

A. For the full width of the claim, yes, sir.

Q. What was their answer to that?

A. He refused it. I don't remember what he said. It was only a moment's interview.

Mr. CLAYPOOL.—I wish to offer Mr. Bush's deposition when it can be produced.

Mr. McGINN.—I don't want it offered after the case is closed.

Mr. CLAYPOOL.—With that exception, we rest.

L. S. ROBE, a witness on behalf of the defendants, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. McGINN.)

Q. What is your name?

A. L. S. Robe.

Q. What is your occupation?

A. Civil and mining engineer.

Q. How long have you followed that?

A. Twenty years.

Mr. CLAYPOOL.—We admit his qualifications.

Q. (By Mr. McGINN.) Are you acquainted with the property known as No. 6 above discovery, right limit, Dome Creek ?

A. I am, yes.

Q. Have you been on that property recently?

A. About 8 or 9 days ago.

Q. Why did you go out there?

A. To make a survey of some property adjoining.

Q. Did you ever survey this property, No. 6?

A. The survey of the property I made sometime prior to that, sometime in October.

Q. In the month of October?

A. In the month of October, yes, sir.

Q. At whose suggestion did you go out there?

(Testimony of L. S. Robe.)

A. At the instance of the claim owner of the right limit bench, first tier.

Q. Mr. Zimmerman?

A. Mr. Zimmerman, yes, sir.

Q. Did you survey the claim? A. I did.

Q. And afterwards drew a plat of it?

A. I did.

Q. Is that the plat? I now call your attention to Defendants' Exhibit "B." Is that the plat you drew of the claim? A. Yes, sir, that is my work.

Q. How did you get at the figures there, the courses and distances?

A. The survey was made from the center line, the distances taken from the center line, also the side lines, the lower end line and the upper end line rather, and the side lines calculated from those distances and bearings.

Q. Where did you get that from?

A. From an actual survey made on the ground by myself.

Q. You had your field-notes? A. I did.

Q. You made the plat from your field-notes?

A. I did.

Q. State what the distance is from the point marked here as "E" to the point marked "H"?

A. The distance is 1356.4 feet.

(Testimony of L. S. Robe.)

Q. What is the distance from the letter "C" to the letter "B"? A. 1367.4 feet.

Q. What is the distance from the letter "A" to the letter "B" A. 1315.4 feet.

Q. What is the distanct from the letter "F" to the letter "G"? A. 1325.1 feet.

Q. The distance from the letter "G" to the letter "H"? A. 301.6 feet.

Q. And from the letter "H" to the letter "B"?

A. 288.9 feet.

Q. And from the letter "F" to the letter "E"?

A. 364.4 feet.

Q. And from the letter "E" to the letter "C"?

A. 345.6 feet.

Q. And from the letter "E" to the letter "A"?

A. 477.2 feet.

Q. And the map shows the courses?

A. Correctly indicates the courses, yes, sir.

Q. Are those measurements correct?

A. I will vouch for them.

Q. Did you ever compute the acreage that is included within the lines marked by the letters "F, G, H, B, A, E"? A. I have.

Q. What is it? A. 21.64 acres.

Q. And the conflicting figures "C, E, F, G, H, B"? A. 19.87 acres.

(Testimony of L. S. Robe.)

Q. What is the acreage that is included within the figures "A, E, F, G, H, B and back to A"?

A. That would be 21.64 acres.

Q. You examined the lines of that claim very carefully, did you? A. I did, sir.

Q. Did you notice whether any of the lines had been blazed or not, particularly the lower end line?

A. There had been blazing from the initial stake in a northerly direction along or on the south, along the west boundary line of the claim.

Q. Just indicate upon the map where that was?

A. From about here (showing) in this direction.

Q. Do you know where Mr. Zimmerman's stake was? A. I do.

Q. Where was that with reference to Mr. Zimmerman's stake?

A. It was practically on that line as he claimed.

Q. Did you see any blazed line from the point indicated upon the map by the letter "E" to the letter "A"?

A. That had been pretty widely blazed there, practically covered both lines of stakes.

Q. How recently?

A. I couldn't absolutely state.

Q. Was that a defined line from the letter "E" to the letter "C"? A. Yes, I think it is.

Q. What stakes did you find around there?

(Testimony of L. S. Robe.)

A. I found Funchion's stakes for the southwest corner of his bench claim, marked with his name.

Mr. CLAYPOOL.—Whose?

A. I should say Mr. Zimmerman's.

Q. (By Mr. McGINN.) Did you compare the handwriting? You saw the handwriting on these various stakes? A. I did.

Q. Did you see the handwriting upon the lower left limit corner stake?

Mr. de JOURNEL.—We object, as the witness is not shown to be an expert in handwriting.

(Objection overruled.)

A. Zimmerman's stake?

Q. No, Funchion's stake.

A. I saw the writing and took copies of most of the writing.

Q. You saw the writing upon the lower center stake, also? A. I did.

Q. Do you remember now whether they were in the same handwriting?

A. I couldn't state positively.

Q. Did you see any stakes near where Mr. Zimmerman's corner stake was, his left limit corner downhill?

A. There was one stake only, as I remember, about eleven feet and a half in a southerly direction.

(Testimony of L. S. Robe.)

Q. Did you examine it to see whether there was any writing on it? A. I did.

Q. Did you find any?

A. It was marked for the southeast corner of the Banner Group Association.

Q. That is the only stake that you saw there at that time?

A. The only one that I can recollect at that point.

Q. (By Mr. de JOURNEL.) Which point is that?

A. (By Mr. McGINN.) He said about 11½ feet from Mr. Zimmerman' stake.

Q. Did you see a stake about a foot and a half east from Zimmerman's stake?

A. I cannot say that I did. In fact, I feel positive that there was no stake there at the time of the survey. I cannot recollect any such stake.

Q. You would have a memorandum of that stake in your field-notes, if there was one there?

A. I would I think.

Mr. McGINN.—You may take the witness.

Cross-examination.

(By Mr. de JOURNEL.)

Q. Why did you measure and survey this claim 6 above creek claim with red lines and black lines?

(Testimony of L. S. Robe.)

A. With a desire to show a difference between the properties as claimed by the respective claimants.

Q. Under whose directions? At whose request did you survey in that manner?

A. Mr. Zimmerman's.

Q. The black lines purport to show the claim as Mr. Zimmerman explained to you it was staked?

A. It does.

Q. The point "C" purports to be what?

A. The southwest corner of the bench claim as claimed by Mr. Zimmerman.

Q. So that you did not see at the point "C" any stake of Mr. Funchion's?

A. I do not recollect having seen such a stake.

Q. You saw at "A" a stake with the name "J. C. Ross, per Funchion," did you not?

A. I believe I did.

Q. But you were instructed by Mr. Zimmerman to reduce that claim 6 above Discovery creek claim with the line marked in black upon tht plat, to the corner stake "C" of Zimmerman's, and make it a common corner stake between Zimmerman's claim, first tier, and Ross and Funchion's claim the creek claim; is that correct?

A. I made the survey according to the stakes as planted by Mr. Zimmerman and also made the sur-

(Testimony of L. S. Robe.)

vey as claimed by the other people establishing the fact that they had an excess in acreage of practically 1.7 acres.

Q. You took the stakes of Ross, per Funchion, so far as the other points "E, F, G, H and B" are concerned, but not at "C"; you took all the other stakes of Funchion and Ross at all the other points except the point "C."

A. That I could hardly state. The two south corners were indisputably the only corners to take there; there was no doubt.

Q. What do you call the south corners?

A. (Showing on plan.)

Q. You say you used the Funchion stakes at "F" and "G"?

A. Those were the only stakes I could find there that I thought bore any relation to the claim in question.

Q. Did you not find a stake at "E" and another at "H"?

A. Those were without question the original center location stakes.

Q. They were also these Funchion stakes?

A. They were.

Q. You also saw a Funchion stake at "B"?

A. Yes.

(Testimony of L. S. Robe.)

Q. So that you saw five stakes of Ross and Funchion. Is that right?

A. I think you are right, sir.

Q. Now, all these stakes that I have mentioned to you except "C" are trees, are they not? These five stakes I have just mentioned to you?

A. I think they were in the main all tree posts, or most of them.

Q. They were all, were they not? Can't you find that in your field notes? Did you not take a description of the stakes in your field-notes?

A. I generally take that pretty carefully. My recollection is that they were nearly all trees, tree posts.

Q. Except this one at "C,"' which was a stake, was it not, or a tree?

A. That I think was a tree post, if I am not mistaken.

Q. But it was not marked "Funchion." That is a stake pointed out to you by Zimmerman as Funchion's stake; that is the only knowledge you had. You did not see his name there?

A. I did not see Mr. Funchion's name there.

Q. You saw Mr. Funchion's name on "A"?

A. I saw his name on a stake there, although it looked more recent writing than the original location.

(Testimony of L. S. Robe.)

Q. I ask you if you saw his name at "A," recent or old.

The COURT.—Let him turn to "A" and tell what he did see there. Those two stakes are important, and, if he has any testimony, let him find it.

Mr. McGINN.—I do not deem his testimony very material at this late date, because he was only out there in October this year.

The COURT.—He can tell what he saw there.

A. (Reading from field-notes.) The northwest corner post; I can give you the description of the writing on that post: "Tree post five inches diameter, spruce, fair sized post. About markings: West side blazed "5 A Dome Upper Corner Stake Right Limit. O. S. Clark"; south side "Dome Creek." Other Writing on post, but not legible. East side: "Lower corner stake of creek claim No. 6 right limit, James Funchion"; and below this "Northwest corner No. 6, Jackson, Surveyor." I have a note here, also made at the time "Northwest corner post." "North, East and West sides of this post show more recent blazing than original blazing as still evidenced on south side of the post. No date shown."

Q. What color was the writing of Jackson?

A. Mr. Jackson's is invariably in blue pencil.

(Testimony of L. S. Robe.)

Q. Is it not a fact that the line "A"-"E" is very plainly cut out?

A. That was plainly cut out, and the other is equally plain.

Q. You mean by the "other" from "E" to "C"?

A. Yes, sir, I think so.

Q. You could easily trace the boundary from "E" to "A" by reason of that cutting, could you not, just as easily as you could from "E" to "C"?

A. Yes, sir.

Mr. McGINN.—This is all immaterial, occurring in October, long after the suit was instituted.

The COURT.—It shows the conditions as they exist now.

Mr. McGINN.—That is not the question. The question is: What were the conditions at the time Mr. Zimmerman staked there?

The COURT.—That is the true question. Counsel may make it very brief.

Q. (By Mr. de JOURNEL.) There was some suspicion cast over this cutting and blazing.

The COURT.—The Court has permitted you to show it, but make it brief.

Mr. de JOURNEL.—That is all.

Mr. McGINN.—That is all.

A. ZIMMERMAN, a defendant, called in behalf of the defendants, being sworn, testified as follows:

Direct Examination.

Q. (Mr. McGINN.) What is your name?

A. A. Zimmerman.

Q. How long have you lived in Alaska?

A. I was here in 1898 and went out and came back in 1903 again.

Q. How long have you lived on Dome Creek?

A. I lived there from the fore part of September, 1904; that is, for steady.

Q. When were you first upon Dome Creek?

A. I was down there in the latter part of April, 1904.

Q. Did you stake a claim upon Dome Creek in May, 1904? A. Yes, sir.

Q. On what date?

A. On the twelfth day of May, 1904.

Q. What claim did you stake?

A. No. 6 first tier bench, right limit above discovery.

Q. What did you do that time in the way of staking the claim?

A. Well, I went down to the center post and looked at the line and followed the line up to where my post stands.

(Testimony of A. Zimmerman.)

Q. What center post?

A. The lower center post.

Q. Of whose claim?

A. Of Funchion and Jack Ross' claim, originally known as Jack Ross' claim, but of course Mr. Funchion was the locator.

Q. That is the claim that is mentioned here as creek claim No. Six? A. Yes, sir.

Q. You were to the point that is indicated on the map here by the letter "E"?

A. Yes; this center post—that is the lower center post; the old blazes are on there yet; there was only one blaze leading out up to the corner which was standing just about a foot and a half behind from mine.

Q. You say you saw that stake; what was written on that stake?

A. On that stake was claimed thirteen hundred and twenty feet up stream by three hundred and thirty on each side of that stake.

The COURT.—That is this lower center stake?

The WITNESS.—Yes, this lower center stake.

Q. (Mr. McGINN.) Then from that stake in what direction did you go?

A. I went a northerly direction, probably a little west of north.

(Testimony of A. Zimmerman.)

Q. Was there anything there that you followed when you went in that northerly direction?

A. Yes, there was a line blazed leading up to this place.

Q. To what place?

A. To this point where I staked mine.

Q. Where you established your post?

A. Yes; there is a post blazed on all four corners, that probably squared about two inches.

Q. About how far was that post from this lower center stake?

A. That was about three hundred and forty-four or three hundred and forty-five feet, as I stepped it off twice to be sure, because on the outside people generally stake this way that a man has to measure his claim more carefully; this kind of staking don't go in the states; I stepped it twice, and that was about the nearest post and place that I could find here that stated "Dome Creek."

Q. Did you examine that stake?

A. I examined it and read down a quarter ways—down where it said "Dome Creek"; there was writing on it farther up, but the upper part was mildewed and it was dark and you couldn't read it.

Q. What time of day were you there?

A. I was there in the afternoon.

(Testimony of A. Zimmerman.)

Q. What did you suppose from that stake being there?

A. I supposed nothing; that stake was the nearest any place, squared on all four sides, as a post ought to be; so I took it for granted that that was the post.

Q. State whether or not this blazed line that you have spoken of extended farther north than that place.

A. No; there was no line extending farther north from there; only later on—about a month later—on the claim I ran across the upper post.

Q. What do you mean by the upper post?

A. Well, the upper post, what is in dispute now.

Q. The post that Mr. Funchion claims as his corner?

A. Yes, I ran across the upper post—a tree—and looked it all over, and of course there was a notice on, claiming that it was the corner post for five bench, facing west.

Q. Was there any writing on that stake at that time? A. Not that I could see.

Q. Did you examine it carefully?

A. I examined it.

Q. Did you see anything upon that stake that indicated in any way that it was a corner stake of No. 6 creek claim?

(Testimony of A. Zimmerman.)

A. No; you see there was no blazes anywheres that went to show that; a man establishing a corner has to blaze out all those lines.

Q. I am talking about the writing on this stake.

A. There was none there, so far as I could see at that present time.

Q. You say you first saw that about a month after you staked; about how many feet is that stake from the lower center stake of the claim?

A. Oh, about 480 feet, I guess.

Q. Now, then, to go back to the twelfth day of May; what did you do after you saw that stake there, which you saw about three hundred and fifty feet from the lower center post—what did you do in the way of staking your claim?

A. I followed the line up; blazed the line through for my corner post along the creek line—what I supposed was along the creek line—that is, as near as I could trace it out; went up to the upper corner post—I had found that—and then, you see, I put out the hillside stakes.

Q. What stake did you first establish?

A. This corner post; this lower one.

Q. Which would be your southwest corner post?

A. Southwest corner post; yes.

Q. What kind of a stake did you establish there?

(Testimony of A. Zimmerman.)

A. Well, I picked out the biggest tree I could find, because I didn't like to set a stake—it was probably a stake two and a half inches square or such a matter.

Q. What did you write upon that stake?

A. I wrote upon it claiming thirteen hundred and twenty feet up stream along the creek line up to the upper corner post and then six hundred and sixty feet up hill.

Q. Now, you say from there that you proceeded up to the southeast corner? A. Yes, sir.

Q. What did you do while you were up there—while you were going along?

A. When I went up I blazed through and established that upper corner.

Q. What kind of a stake did you place there?

A. That stake what I placed there is just about the same size—probably about three inches square or such a matter.

Q. Both of these were trees, were they?

A. Yes, sir.

Q. And you cut them off and blazed the sides?

A. Yes, sir.

Q. What, if anything, did you write upon it?

A. Well, I wrote on it the same—thirteen hundred and twenty feet down stream by six hundred and sixty feet uphill.

(Testimony of A. Zimmerman.)

Q. Tell the Court how you blazed out that line —or did you cut a line there?

A. I blazed that line up here where the black line goes, from my post straight up to the upper corner along the bench.

The COURT.—That is your south line?

The WITNESS.—Yes, sir, between me and the creek claim.

Q. (Mr. McGINN.) Then what stake did you establish?

A. This one up to the upper corner, up the hill.

Q. Which corner, the northwest or the northeast?

A. The northeast corner.

Q. And you established a stake there?

A. Yes, sir.

Q. What kind of a stake?

A. The northeast corner post of No. 6 bench claim.

Q. Was it a tree?

A. Yes, they are all trees.

Q. Did you square it? A. Yes, sir.

Q. Did you cut off the top of it?

A. Yes, sir.

Q. Did you write on it? A. Yes, sir.

Q. What did you write?

A. "Northeast corner post of No. 6 bench."

(Testimony of A. Zimmerman.)

Q. Did you sign your name?

Mr. CLAYPOOL.—Ask him what he did.

A. I don't know whether I did sign my name or not, but I know that I did that.

Q. (Mr. McGINN.) Then what is the next stake that you established?

A. Followed down to the northwest; blazed a line there and established that.

Q. What did you write upon that stake?

A. I wrote: "Northwest corner post," you see, and that was all.

Q. Are those stakes still standing upon the ground? A. Yes, sir.

Q. All of them?

A. They are all standing unless somebody got away with them the last few days.

Q. Up to the time you came to town were they standing there? A. Yes, sir.

Q. Then what did you do in the way of blazing lines?

A. I came down and blazed lines from that post.

Q. From what post do you mean?

A. From the northwest corner post; then I came down towards the creek and started to blaze the lines towards the southwest corner post through; then I run across John Bush's line when I come down to

(Testimony of A. Zimmerman.)

the center post; you will find there from the center post John Bush goes to the west; he makes a crook in his line; and there is a wide fraction between them that would be vacant ground; I established that corner and came down and struck what I took for his center post; it is a birch post and it is very moldy and you couldn't read nothing on it, but I took it to be his center post.

Q. Tell the Court what you did in the way of blazing this lower end line of the claim?

A. I blazed it up to there from there, you see, there was a line.

Q. Already blazed?

A. Already blazed; and I went home and didn't do nothing more to it until the latter part of May I come to town and went to Dome and stayed a couple of days there.

Q. When were you next upon the property?

A. Well, that was the time, you see, when I come down and found that corner that was John Bush's.

Q. That was about a month later?

A. That was the latter part of May I come to town; I intended to come to town; the first steamer was due to reach Chena and I intended to come to town and get some vegetables and butter.

Q. That was about a month later?

A. Yes, sir.

(Testimony of A. Zimmerman.)

Q. Did you know then that Funchion claimed that as his corner stake?

A. No, sir, there was no sign that indicated anywhere that it was his corner.

Q. When did you first find out that Funchion claimed that as his corner stake?

A. It was in 1905, when he came out there and cut his line—he and Mr. McPike.

Q. Before McPike and Funchion came out there together, was Funchion out there alone?

A. He was, about a week before that, I presume.

Q. Did you see him at that time?

A. Yes, sir, he was at my cabin.

Q. Did you show him anything?

A. Yes, sir.

Q. What did you show him?

A. I showed him some gold I had taken out; I had about a dollar and a half of coarse gold.

Q. Where had you taken it from?

A. Out of this claim; out of my bench there.

Q. How many shafts had you put down at that time upon the property? A. Two.

Q. To bedrock? A. Yes, sir.

Q. Had you done any drifting?

A. No; not much.

Q. What was the distance to bedrock there?

(Testimony of A. Zimmerman.)

A. About twenty-six feet; it is in a gulch and the muck is pretty much sluiced off.

Q. And you showed him about a dollar and a half in gold dust at that time? A. Yes, sir.

Mr. CLAYPOOL.—I object to that as repetition.

The COURT.—Sustained.

Q. (Mr. McGINN.) When did you next see Mr. Funchion?

A. About the eighth day of April, because I marked it down when he cut the lines. He come down and cut that line; I was working on 7 then with my partner and he started in—there was no dispute on 7, on that corner above—and he started in from there and about noontime I went down and seen where he had cut that line to, and he was sinking a hole there, and there was that new notice and new blazes placed on that spot.

Q. Up to that time had you seen any writing upon that post that indicated in any way that that was the corner stake of No. 6?

Mr. CLAYPOOL.—We object to that as leading.

(Objection overruled. Plaintiffs except.)

A. No; there was none up to this time when Funchion came; there was a man's name, Frank McPhail—

Q. I mean anything about No. 6 creek claim?

(Testimony of A. Zimmerman.)

A. No; no sign up to that time.

Q. What was written upon that stake at that time? A. What?

Q. Up to the time that Funchion and McPike came out there, what was written upon that stake?

A. The time when I was in town?

The COURT.—The question is, what was written on it?

A. A notice was on: "F. X. McQuillan."

Q. Do you know who put that there?

A. I didn't know then, but I found out later on.

Q. When did you first see that on that stake?

A. When I came back from town; that was probably the eighteenth day of June.

Q. Of what year?

A. 1904. I stayed about three weeks in town and went back and went over to Dome and then is when I seen it.

Q. That stake continued in the name of McQuillan up to what time?

A. Up to the time when Funchion and McPike blazed that line there.

Q. Did you examine it after they left?

A. Yes, sir.

Q. What had they done to that stake?

Mr. CLAYPOOL.—We object to that.

(Testimony of A. Zimmerman.)

The COURT.—He may testify to what had been done and who had been there.

Mr. CLAYPOOL.—If he saw them.

Q. (By Mr. McGINN.)) Did you see them do something to that stake Funchion and McPike?

A. I seen the both of them standing at the stake and moving around. I didn't see them actually cut it, but I know that Funchion was going through the movements like a man would write, because I was away back on a hill, probably in the middle of the claim. My partner went to cook dinner and I followed the men up and saw them cutting the lines through.

Q. Was the stake cut by an axe during the time Funchion and McPike were there about the eighth of April, 1905?

A. Yes, you see, they must have cut it with their axe.

Q. Was it cut during the time that they were there? A. Yes, sir.

Q. How was it cut?

A. It was chopped off new where that McQuillan notice was on, that is on the east, facing up creek; and chopped also on the west side.

Q. You say that was cut off? A. Yes, sir.

Q. Was anything placed there in its stead?

(Testimony of A. Zimmerman.)

A. Funchion's notice the way it stands now.

Q. What was that?

A. It claims it is the lower right limit corner of No. 6 bench James Funchion.

The COURT.—Of No. 6 bench?

The WITNESS.—No; No. 6 creek; James Funchion.

Q. (Mr. McGINN.) Up to that time had you ever seen anything written on that post, showing that it was a stake of No. 6 creek claim?

A. No.

Q. What other writing or cutting or blazing was done upon that stake?

A. On the side facing towards the west downstream there was John Bush's notice of the bench; it didn't state "John Bush," but it stated on it: "right corner post No. 5 bench," and that was gone when I went down in the afternoon and Clarke's notice was on.

Q. You say the writing of the bench claim was gone from the stake too?

A. Yes, sir, that was cut off.

Q. What was that Clarke's notice?

A. Clarke's notice claimed corner post of the creek.

Q. What number creek claim?

(Testimony of A. Zimmerman.)

A. No. 5 creek claim.

Q. In whose name was that claim staked, if you know? A. It was staked for Clarke.

Q. By whom?

A. I think by Wilson; Wilson's signature is on there, if I remember right; Wilson staked it, that is, as his attorney.

Q. Did you see Wilson's signature on this stake that is in question in this action?

A. What stake?

Q. This post that Funchion now claims.

A. No.

Q. (The COURT.) Did you see it on the other post—the lower one?

A. I seen Wilson's signature on the lower center post; that would be the upper center post of 5, and I also seen Wilson's signature across the creek on the left limit; that was the lower left limit corner post, and it was Wilson's handwriting, so far as any man could make it out. There are two different handwritings together there; one handwriting there on the center post—on the lower center post—two different handwritings together; one handwriting what would indicate that it is Wilson's—a fluent handwriting—while the other had a hard job to put a notice on.

(Testimony of A. Zimmerman.)

Q. (Mr. McGINN.) Had you seen Funchion out upon this property before you saw him out there in April?

A. No; only that time that spring—he was out there about a week before; I never knowed the man and never had seen him, to my knowledge.

Q. Did you see Ross out there?

A. Yes; he was there the fall before that, when they were doing assessment work.

Q. Did he see your stake out there during the time he was there?

A. Well, he should have seen it; he never talked anything about stakes, because, you see, the trail led right past that stake.

Q. Past what stake?

A. Past my stake. The trail at that time, that I had staked—it was in winter time, and snow on the ground and brush—the main trail—the boys below from there had brought in a boiler—went along the hillside, where the wagon road is now; and from there down, you see, I had cut the trail better out, so that I had better walking down to my post; then, a little ways off to the southwest, there is the assessment hole, and of course I was down there when I was working; so he couldn't help but see it—that is, if he wanted to take notice of it—he had to pass it.

(Testimony of A. Zimmerman.)

Q. You say you went to live upon this property in September 1904? A. Yes, sir.

Q. And have lived there ever since?

A. Made it my home.

Q. You have a cabin upon the place?

A. Yes, sir, I built a cabin there and started in to live there in the latter part of September.

Q. When did you start to work upon the property in dispute in this action?

A. Well, I started in last spring—either the latter part of May or the forepart of June; I was working there developing some ground and the water gave out there—as soon as the snow was gone the water gave out there.

Q. When did you get down to bedrock?

A. It must have been the latter part of June; on the night of the Fourth of July we had pay.

Q. You located pay about the Fourth of July?

A. We had it; I think we had dug the ditch all right.

Q. Up to that time had there been any pay found along there?

A. Yes; I had found fairly good pay farther up on the bench.

Q. About how far from the line?

A. Well, from this line what is in dispute, probably a hundred feet higher up.

(Testimony of A. Zimmerman.)

Q. But on the disputed strip, had there been any pay found up to that time? A. No.

Q. You were the first one to locate the pay there?

A. Yes, sir.

Q. How long was it after you located the pay there that Mr. Jackson came out there to survey it?

A. Well, it was over a month, probably six weeks, or nearly two months; I don't know exactly, because it took us some time to dig ditches and build boxes and go ahead; there was only two of us to do all that dead work.

Q. Before you staked out there did you pan on the surface of the ground? A. No.

Q. Did you pan any of the muck and make a discovery?

A. No; that ain't my proposition; I ain't practicing panning that.

Q. When did you first pan upon the property?

A. Well, when I got near bedrock.

Q. What did you find?

A. I found good prospects in the first pan; I was surprised; I was sinking all alone. I didn't have a partner, and I was sinking with fires, and I just went down and commenced to take out a thaw that I put in by fire, and I was surprised, as it looked as though I had bedrock; I panned that noon and had about fifteen to twenty cents to the pan.

(Testimony of A. Zimmerman.)

Q. What date was that?

A. Some time about the middle of February, 1905.

Q. Did you cause a notice of location of this claim to be recorded? A. Yes, sir.

Mr. McGINN.—We desire at this time to introduce in evidence a certified copy of the location notice filed by Mr. Zimmerman.

Q. (Mr. McGINN.) Where is the original notice; do you know? A. In the office.

Q. Did you ever get it out of the recorder's office? A. The receipt for it.

Q. What did you do with your location notice?

A. I gave it to the recorder and it must have been in the office.

Q. You never got it out of there, did you?

A. Yes, I think so.

Q. You think you got it out?

A. Yes, sir.

Q. When?

A. That fall; I think it is home.

Q. You think you have got your original location notice home? A. Yes, sir.

Q. You did not bring it with you?

Mr. de JOURNEL.—We will not take advantage of that.

(Testimony of A. Zimmerman.)

Mr. McGINN.—We then introduce in evidence a certified copy.

Mr. de JOURNEL.—We object to the introduction of the certified copy, on the ground that it is insufficient to justify the claim, or to fix the location of the claim in any way, and that it is inadmissible upon these grounds.

The COURT.—Read it.

Mr. McGINN.—(Reads:) "No. 2173. Fairbanks Mining District of Alaska. Location Notice. I, A Zimmerman have located a placer mining claim on the right limit of Dome Creek. Claim abounces on or about an no 6 above discovery on side creek claim. Claim is a hill side claim. I claim 1320 feet up stream from lower side line staked to upper side line stake by 660 feet up hill for placer mining purposes. Located May 12, 1904. By A. Zimmerman. Filed for record May 31, 1904, at 30 min. past 9 A. M. John L. Long, Acting Recorder."

The COURT.—Objection overruled. It may be admitted.

(Marked Defendant's Exhibit "C.")

Mr. McGINN.—You may cross-examine.

(Testimony of A. Zimmerman.)

Cross-examination.

(By Mr. de JOURNEL.)

Q. You claim that this point "C" is your stake do you not? A. Yes, sir.

Q. You also claim it is the original corner stake of the Ross claim, No. 6? A. Yes, sir.

Q. What is the distance from "C" to the northwest corner of your claim?

A. Well, I stepped it off and I think it is not any more than 600 feet.

Q. Did you have it measured?

A. I know I stepped it off and it didn't look to be far enough, because the upper corner is only a little over 500 feet up hill.

Q. The upper corner?

A. This upper post (showing on plan).

Q. Is 500 feet?

A. Yes, a little over.

Q. What did you intend to stake at that time, 660 feet?

A. Yes, that is, so far as possible. This would be my initial post (showing) binding the claim on here, in case I got it a foot or two too much I would lose it there.

Q. You would lose it where?

A. Up here (showing).

(Testimony of A. Zimmerman.)

Q. You know you have got too much, do you not? A. No, I do not.

Q. You didn't have it surveyed?

A. No.

Q. You only had our own survey?

A. There was no trouble with mine, only you wanted to push me up hill and throw off on the other side.

Q. You thought there was trouble about that one (showing).

A. Of course, when they started to make this line I knew there was trouble then.

Q. That was in 1905?

A. That was in 1905.

Q. You did not say anything at that time?

A. So far as nobody bothered me and I had possession of the ground, I didn't have nothing to say.

Q. You didn't raise any trouble with them at that time while they were blazing there?.

A. I was working up on 7. If I had been working on the lower end of 6 and I had seen they had cut that off and established new posts, I probably would.

Q. You mean 7 bench?

A. I was helping my partner on 7 bench; we were helping one another.

(Testimony of A. Zimmerman.)

Q. The first time you raised trouble with it was when the pay was struck on 7 above here, was it not?

A. No, I don't think pay was located when I came over there.

Q. When you came to sink on that claim 6 bench as you claim? A. Yes, sir.

Q. Is it not a fact that the pay had been located above? A. I don't think so.

Q. Do you know so.

A. Well, you see Bob Chamberlain just about that time he was drifting. You see he was drifting and his partner intended to give up and then they went into better prospects. We were out of water on Murry Pup and we had nothing else to do. Either go up on 7, and we had a little pay there, or sink a new hole and prospect on another place.

Q. You mean to say that when you began to sink the hole you did not know that pay had been located above you on No. 7 creek?

A. No, I don't think I did at the time, that is, when I started to work.

Q. Perhaps you mean that you didn't know at that time, but do you know now that it had been located?

A. No, I don't know now, but shortly after that time they did strike better pay. They never had anything, it is about a cent and a half or so.

(Testimony of A. Zimmerman.)

Q. You say "shortly after"?

A. A few days or a week or something like that.

Q. That is the time that you began to sink a hole there on that piece in contest?

A. That I would not say. I don't think so, because I am very well acquainted with Bob Chamberlain and Jack Carter. They did not have any pay when I came over there. You see me and Ed came over there when we left Murray Pup, and when we came over there it was on Sunday and they didn't have any pay then. On Monday we moved back into the cabin again and started to work that week.

Q. You saw them frequently at that time?

A. Yes, sir.

Q. You were talking with them about what they had and what they hadn't?

A. Certainly, we generally knowed what he had and what he didn't have.

Q. And you didn't have the slightest idea that there was any pay located above you that might possibly run through this claim in contest?

A. No, because so far as that piece of ground is concerned I never considered that in contest.

Q. You did not? A. No.

Q. Yet you knew that they had cut the line, first plazed it and then cut it with the intention of

(Testimony of A. Zimmerman.)

claiming it in 1905, and you had not said anything at that time so you did not consider it in contest.

A. No, I didn't consider it was in contest, because the lines should be blazed when a man stakes before he places a claim on record.

Q. Do you remember having a conversation with McPike and Funchion when they were cutting the lines there?

A. No, because I never talked with McPike then.

Q. Did you have any conversation with either of them?

A. I don't think so; I don't know. We were working about on 7.

Q. Did you have any conversation when they were cutting the line with either McPike or Funchion or both of them?

A. I don't remember if I did or not.

Q. You wouldn't swear that you did or not?

A. No, I wouldn't swear either way, that is, to be positive.

Q. Did you not have a conversation about that corner stake, that very corner stake in contest now? which you deny and which we contend for; wasn't that talked about on that day between you?

A. Between me and—

Q. And either Funchion or McPike?

A. No, not that day when Funchion cut that line.

(Testimony of A. Zimmerman.)

Q. When they were cutting this line you had a conversation with them? A. No, sir.

Q. (Continuing.) About that stake?

A. No, sir.

Q. Nothing was said about that stake?

A. No, Mr. Funchion went downhill and extended his territory on some other claim.

Q. I am asking you if you had any talk about that corner stake.

A. Not that I remember, as I said.

Q. At that time was that upper corner stake, which we contend to be our stake, faced on four sides or two sides or three sides or what?

A. It was faced slightly on four sides, that is, on the north side it was not faced much; on the east side it was very little; on the south side it was faced a little better, and on the west side there was nothing.

Q. Nothing on the other face? A. No.

Q. You didn't see "Dome Creek" written there?

A. No, I am positive "Dome Creek" wasn't there at all. You see at the time when the dispute came with the Banner Group on 5, Mr. Osborne and Mr. Bridges and Mr. Hess, the lawyer from town here, were out there, and that was an old side blaze but since that day I remember there was some writing but it appeared to be dim.

(Testimony of A. Zimmerman.)

Q. "Dome Creek" wasn't there at that time?

A. Not up to that time, until after them people had been there.

Q. I believe you said that you knew Mr. Wilson's handwriting, that you had observed the peculiarities of it?

A. Yes, sir, I think I do.

Q. Was the word "Dome Creek" written on that stake written in Mr. Wilson's handwriting?

A. I don't think so.

Q. Do you know?

A. I am not saying positively, but there is another man writes pretty near the same, Mr. Osborne. Go and investigate his notices his handwriting, and you will see he is a swift writer with big letters.

Q. I am asking you if you will swear that the word "Dome Creek" was not written in Mr. Wilson's handwriting?

A. I probably couldn't, that is positively, but it is pretty near like it.

Q. That is all I want.

A. You see, Mr. Osborne himself writes a good hand, pretty near the same as Wilson, and I never noticed any writing before there until the dispute came with the Banner Group and No. 5 and all them claims below there, and Osborne, Hess and Bridges had a compass and surveyed the lines out

(Testimony of A. Zimmerman.)

and cut the lines. There was no lines cut, no sign, until Funchion came around there, showing up to his upper post, only a light blaze up to the post where I staked. Funchion cut one line through and you would find a few trees in the center; Mr. Funshion's line wasn't very straight. Mr. Hess and that gang, you see, came over there and cut the lines and cut it straight so they could see straight through from the center post, and they finished a good line on the other side, trying to survey these people out of that hole they had sunk and make it appear that that post was 5 creek corner post and the hole they had sunk, the discovery, they wanted to beat them out of that it seemed.

Q. Is that all the explanation you wish to make?

A. Yes.

Q. Now, the day that you staked your claims, did you or did not you see that corner stake of Funchion's, as we claim it?

A. No, I did not see no line blazed through there, and I did not go, because I went east and established the upper corner post; then, you see, I went all around the claim until I came back and struck a line blazed from there down, you see, struck what I took to be the center post proper, because it was moulded and you couldn't read anything on it, but

(Testimony of A. Zimmerman.)

it was a good sized post of 5 bench, because I know the 5 bench stake. I was very well acquainted with John Bush and Wilson. As it was about mealtime when I struck that line there, you see, I went down the creek to where there was an old tent on 3 below in order to get out of the mosquitoes and make myself a lunch, and I then went back up to the gulch.

Q. You believe you saw the 5 bench post.

A. I saw it, you see, that is, after I found it about a month later when I came back from town.

Q. And you claim that this corner post is not the corner post of 5 bench claim also.

A. Yes, sir, this corner post which is now in dispute was the corner post of No. 5 bench.

Q. And going further up the hill you found the center post of No. 5 bench?

A. Yes, going uphill.

Q. But that was only at that time the corner post of No. 5 bench.

A. That was all that there was on there, that is, when I found it coming back from town, that is all there was there. McQuillan's notice—of course, that had been done just a few days before; that is, McQuillan's notice had been put on there, but the corner post of 5 bench was there and their notice.

Q. That was all there was on that post, that it was the corner post on 5 bench.

(Testimony of A. Zimmerman.)

A. That was all.

Q. And nothing else? A. Nothing else.

The COURT.—I would like to have counsel go on a little further with regard to this lower corner post.

Q. (By Mr. de JOURNEL.) The only reason why you thought it was the corner post of Mr. Bush, was because it was old and faded.

A. Not so very old, but it was old enough, you see. It was a year old then, that is, according to what I knew of when Bush staked. I looked at it and that was all I seen that was on it.

Q. And that was the reason why you thought it was the Bush stake?

A. Well, I knew it was because his notice was on there.

Q. His notice was there?

A. His notice was on there.

Q. And the only one?

A. The only one besides the notice of McQuillan; but McQuillan's was new, though.

Q. Going down to the next post, which you claim as your post, how was it faced when you saw it for the first time? A. It is faced on all four sides.

Q. And what size?

A. From an inch and a half to two inches square; a small tree, a stump, post.

(Testimony of A. Zimmerman.)

Q. How high?

A. Oh, about four and a half or five feet.

Q. Do you recollect what was written on the four faces?

A. No, sir, it was mouldy, only you could see the lower part. You could see "Dome Creek." There was written more, but you couldn't make it out.

Q. You could see "Dome Creek" on that one?

A. Yes.

Q. And you didn't see "Dome Creek" on the upper one? A. Not at that time.

Q. You saw it since, though?

A. Yes, I have seen it since.

Q, It was also "Dome Creek" on that post?

A. "Dome Creek" and a notice there.

Q. On what face was that?

A. Facing down towards the creek, that is, south.

Q. On the south face was "Dome Creek" and a notice on that? A. Yes.

Q. Any name? A. No.

Q. The same writing as the other?

A. The same writing as it is on that number 6 creek notice that I seen.

Q. The writing upon that stake looked to you to be the same as the writing that was on the center stake of the Ross claim, and on all the other stakes of the Ross claim?

(Testimony of A. Zimmerman.)

A. So far as I see, there are two manners of writing on some of them stakes, you know.

Q. Would that be like Mr. Wilson's writing?

A. Not on this post it was not like Mr. Wilson's writing. It was better handwriting.

Q. It was on what face?

A. Looking down towards the creek, that is south.

Q. What was on the face looking up stream towards the east? A. Nothing that I could see.

Q. It was blazed, but nothing written?

A. It was blazed, yes.

Q. On the face looking uphill, which would be north, what was there? A. None.

Q. Not a thing?

A. Nothing that I could see.

Q. And on the face looking down stream and west, what was on that?

A. There was nothing that I could see.

Q. So there was only one notice on that?

A. There was one notice that showed any sign of a notice there.

Q. That was on the 18th of May, 1904, or the 12th of May? A. On the 12th of May.

Q. It was faced on four sides and only one side written on, the side looking south? A. Yes.

Q. Claiming the creek claim? A. Yes, sir.

Q. In a handwriting which is unknown to you.

(Testimony of A. Zimmerman.)

A. Claiming the creek claim? I couldn't say as to that. I took it to be that. Well, there was a notice or a sign of a notice, and I took it to be the creek claim, because, while it was moulded, it took careful study, and a man studying it up carefully may find the whole notice. It was the nearest post anywhere in place.

Q. You never did any work on that claim until May or June? A. On our claim?

Q. On that piece of ground in contest?

A. That is all.

Q. Do you know that Mr. Wilson staked a fraction somewhere there? A. Yes, sir.

Q. Where is that fraction?

A. That fraction is between 5 creek and 5 bench; he staked 180 feet.

Q. (By the COURT.) Who staked that?

A. Mr. Wilson.

Q. (By Mr. McGINN.) Indicate upon the map between what stakes?

A. Here is the fraction. His center post was what I took to be the creek corner of 6; his notice is on there yet, because I was there when he staked it. Here, right across here, is his upper center stake. He staked altogether claiming 180 feet. That is about 135 feet between there and there.

(Testimony of A. Zimmerman.)

(By Mr. de JOURNEL.)

Q. Do you know where the corner of 5 creek claim was prior to his staking that fraction off 5?

A. He ought to know. He is supposed to have staked that creek claim and he also staked the fraction. He came to me as soon as he heard I struck pay and stayed a night with me there, and the next day took my ax and I went down with him and I seen him stake it.

Q. Did he make any statement to you at that time?

A. No, he never said anything to me about any corners or any trouble at all. I never knowed anything about any trouble until I saw that wide line cut.

Q. When was that, do you know?

A. It was somewheres about the 20th of February, 1905.

Q. And you say you never saw the corner of 5 creek claim at all?

A. Yes, I saw it when I came back.

Q. When you came back when?

A. That was in 1904, somewhere about the 16th or 17th of June.

Q. Of June, 1904?

A. Of June, 1904.

Q. Where was it at that time?

(Testimony of A. Zimmerman.)

A. It was there as it is there now.

Q. Where? A. Where you see it on the map.

Q. Can you show on the map where it was, about?

A. It is that corner (showing) that John Bush's corner was on, there, claiming 5 bench. It would be the southeast corner of 5 bench claim.

Q. It was the month of June, 1904, was it?

A. Yes, sir.

Q. The corner of creek claim 5?

A. No, not the creek claim; 5 bench.

Q. I am asking you of 5 creek claim. I am asking you, if you saw the corner of 5 creek claim at any time since you staked that claim?

A. That stake of 5 creek claim? No, I didn't see it.

Q. You never saw it until this day?

A. Unless it was on that post, no; I didn't see it.

Q. You don't know at this time where the corner of 5 creek claim is?

A. No, I don't; to be positive, I don't, because there are so many corners. There is another corner —it is lying to one side—up from this about 10 feet, is a post there blazed on two sides, but it seems to have no writing on it. Then Wilson staked this 6 bench in 1903, and there is a post about 60 feet away from here claiming the bench, but he never put it on record.

(Testimony of A. Zimmerman.)

Q. Where is that stake?

A. About 60 feet from here.

Q. (By the COURT.) North?

Q. (By Mr. McGINN.) North from that stake?

A. Yes, north from my stake about 60 feet.

Q. (By Mr. de JOURNEL.) You don't recollect up to this date of ever seeing the corner of creek claim No. 5? A. No, I don't.

Q. You certainly did not see it on that post "A."

A. No.

Q. There was only the bench location there.

A. No, not that I could ever read any notice that identified 5 creek corner.

Q. You were offered by the plaintiffs in this action to take 88 feet by the full width of the claim from the lower center post of 6 creek claim?

Mr. McGINN.—We object to that as immaterial.

(Objection overruled; defendants except.)

A. I was.

Q. How far is your work and your shaft from the lower line? A. My shaft from the lower line?

Q. (By the COURT.) The west line.

A. From this west line, I think it is 84 feet.

(Testimony of A. Zimmerman.)

Q. (By Mr. de JOURNEL.) Eighty-four feet from the west line?

A. Yes, we measured from this post here. You see, if a man measured straight, this is the nearest way a man could measure it. If it is straight, it would probably be 90 or 95 feet.

Q. It is 84 feet from this line?

A. We measured always from the corner, because the shaft is only about 12 feet from the line.

Q. The shaft is 12 feet from the red line "A"-"B"? A. Yes.

Q. And how far back from the red line purporting to be the west boundary of the creek claim, how far back?

A. Well, you see, from here (showing) I think it is 84 feet; but measuring from here it would be probably from 95 to 100 feet, that is, this would be the end line. There was no line here before Funchion came and cut that.

Q. If we did give you 88 feet off of the claim as we claim it at the present time, by the full width of the claim, it would leave your hole inside of your line, would it not?

A. No, I don't think it would, unless you took it from here (showing).

Q. No, I don't mean that. Take it from this red line "A" there. If we gave you 88 feet from there,

(Testimony of A. Zimmerman.)

it would leave your hole within your own lines, would it not?

A, Well, it would just about catch it, but I wouldn't have hardly room to use it. I guess I would have to move that hole.

Q. It would be inside, would it not?

A. I wouldn't say. It just about would catch it, somewheres about it, but it wouldn't bring that hole in safety.

Q. Which way did you drift?

A. Uphill. There are no workings down below towards the creek at all.

Mr. de JOURNEL.—That is all.

Redirect Examination.

(By Mr. McGINN.)

Q. You testified in your cross-examination, as I understood it, that you didn't see anything or any stake out there that marked the northeast corner of creek claim No. 5? A. No, I didn't.

Q. I will ask you about the writing that you saw upon the stake which is in controversy in this action that was placed there by Clark. What about that?

A. Well, the writing is there of course, but just merely identifies that Clark claims it as his corner stake, creek corner stake.

(Testimony of A. Zimmerman.)

Q. When did you first see that?

A. I seen that that same day when Funchion cut that line; that same afternoon.

Q. That was the first time? A. Yes, sir.

Q. That was the only thing that you saw?

A. That was the only time. Both lines were blazed along, and John Bush's notice was cut off and Clark's notice was in place of it, and F. X. McQuillan's notice was off and Mr. Funchion's notice was in place of it.

Q. About this "Dome Creek" that you saw written upon this same stake, the stake in controversy which the plaintiffs in this action claim, you say that you do not know whether or not that is in Wilson's handwriting or not. When did you first see that?

A. I seen that just about—a short time, that is, the next day after they had made the survey, Osborne, Bridges and lawyer Hess.

Q. When did they make that survey there?

A. I couldn't say as to the day, but it was shortly after Mr. Funchion had been there.

Q. It would be some time about the latter part of April, 1905.

A. Just about. The snow wasn't all gone then. It was either the middle or the latter part of April.

Q. Hess, Wilson and Osborne are in conflict there with the Banner Group?

(Testimony of A. Zimmerman.)

A. Yes, I know Osborne is. I don't think Bridges was, and I don't know about Hess. I guess he probably is too, though. But Osborne I know was.

Q. They were trying to establish this as the corner post of creek claim No. 5 were they not?

A. That is what they are doing yet.

Q. Why are they trying to do that?

A. To do them out of that discovery hole.

Q. The discovery hole of the Banner Group, is that?

A. That is, described here, the line would run straight, this line, from the creek, and that is probably 20 or 30 feet of that line. If they establish that as the corner here, that would cut them out of the discovery hole on the creek claim.

Q. And it was not until after Mr. Hess and Mr. Bridges were there that you saw this writing "Dome Creek," that you have spoken about? A. Yes.

Q. And Mr. Osborne.

A. And it was so fixed up, it seems, that you could hardly make it out, but the lower part of it was plain to be seen, that is, they used more pencil. That is the way it seemed to me, a piece of scientific work.

Mr. McGINN.—That is all.

FRITZ BLOCK, a witness sworn on behalf of the defendants, testified as follows:

Direct Examination.

By Mr. McGINN.—What is your name?

A. Fritz Block.

Mr. de JOURNEL.—I want to ask Mr. Zimmerman another question.

A. ZIMMERMAN, recalled for further cross-examination, testified as follows:

(By Mr. de JOURNEL.)

Q. You represented that claim for one of the plaintiffs? A. Yes.

Mr. McGINN.—We object as immaterial.

(Objection overruled; defendants except.)

Q. What year was that? A. The fall of 1904.

Mr. de JOURNEL.—That is all.

Redirect Examination.

(By Mr. McGINN.)

Q. That was after you staked the claim?

A. Yes, sir, I staked that in the spring and the work was in the fall.

Q. (By the COURT.) When did you begin to sink this hole on this disputed tract?

A. I started to sink that last summer, either the latter part of May or the fore part of June.

(Testimony of Fritz Block.)

Q. After you knew there was a contest on over it?

A. Yes, you see, after they had cut that wide line, but they had never bothered me or started to claim it.

FRITZ BLOCK resumed his testimony:

(By Mr. McGINN.)

Q. How long have you been on Dome Creek?

A. Since last July, a year ago.

Q. Are you acquainted with the property that is in controversy in this action?

A. Well, I staked that for Frank McQuillan on the 14th of June, 1904.

Q. You mean side claim No. 6? A. Yes, sir.

Q. The same property that Zimmerman claims?

A. Yes, sir.

Q. Or part of that property? A. Yes, sir.

Q. On what date was that?

A. The 14th of June, 1904.

Q. Do you know the stake that Funchion now claims out there to be the northwest corner stake of creek claim No. 6?

A. You mean the upper lower corner stake?

Q. The upper right limit corner stake.

A. I used that for the center post of bench No. 6 for Frank McQuillan.

Q. You used that for the center stake?

(Testimony of Fritz Block.)

A. Yes, sir.

Q. Upon the 14th day of June, 1904?

A. Yes, sir.

Q. Did you see any writing upon the stake at that time?

A. Upon the stake there was some old writing that I couldn't make out. I put the notice of Frank McQuillan on.

Q. (By the COURT.) Did you cut the old writing off?

A. No, sir, I did not. I couldn't make it out. The rain had faded it away and I couldn't make it out.

Q. (By Mr. McGINN.) You couldn't make anything out at all on it? A. No.

Q. Did you blaze the stake on that day?

A. I did not.

Q. Did you write on it?

A. Yes, I wrote the notice.

Q. What did you write?

A. "Lower center stake" and the date, and "1320 upstream and 330 feet on either side."

Q. You used that for the center stake, did you?

A. Yes, sir.

Q. Did you examine any of the stakes of creek claim No. 6?

(Testimony of Fritz Block.)

A. When I came down the creek I came down on creek claim No. 6, and I went to the lower center post, and I followed a blazed line.

Q. You followed a blazed line uphill?

A. Yes, sir.

Q. Do you know where Zimmerman's line is?

A. We struck Zimmerman's stake.

Q. Did that blazed line lead right up to Zimmerman's stake? A. Yes, sir.

Q. Did it go beyond that?

A. I did not know that. There was an old blaze.

Q. Beyond that stake? A. Yes, sir.

Q. And within Zimmerman's new blazing?

A. Yes, sir.

Q. How long did McQuillan's name stay on that stake, if you know?

A. I don't know. It was chopped off.

Q. When did you first see that it was chopped off? A. I don't know.

Q. About when?

A. Lately now, about 6 or 8 weeks ago, something like that.

Q. And you found that the writing which you put on the stake was taken off? A. Yes, sir.

Q. Mr. McGINN.—That is all.

(Testimony of Fritz Block.)

Cross-examination.

(By Mr. de JOURNEL.)

Q. What did you see on that post when you used it for your center stake of the McQuillan claim?

A. There was a lot of old writing I couldn't make out.

Q. On either side? A. I did not look.

Q. Was it faced on 4 sides or only on one side?

A. It was faced on four sides.

Q. Did you look all around it?

A. No, sir.

Q. Which way did you look?

A. Up the creek.

Q. You only looked at the face that you wanted to use? A. That is it exactly.

Q. You didn't look down the hill, south; you didn't look on that face, did you? A. No.

Q. You didn't look on the face looking uphill?

A. No.

Q. You simply looked on the face looking upstream? A. Yes, sir.

Q. Are you a pretty good scholar? Can you write pretty well?

A. I can for my own use. I can write all right.

Q. What is the name of McQuillan?

A. Frank McQuillan, I wrote for him.

(Testimony of Fritz Block.)

Q. Is that what you put on?

A. Yes, sir, Frank McQuillan.

Q. You put on "Frank McQuillan"?

A. Yes, sir.

Q. You did not put on F. X. McQuillan?

A. No, I guess not; I might.

Q. Can you write what you put on there?

A. (Writes on a piece of paper.) I forget the name.

Q. You forget his name?

A. Yes (writes). I forget his name.

Q. Is it something like you put on?

A. It is a different name.

Q. (By the COURT.) What is the difference?

A. (By the WITNESS.) I put "Frank McQuillan."

The COURT.—It appears from the testimony that it has been cut off, whether it was Frank McQuillan or F. X. McQuillan.

Mr. de JOURNEL.—I wanted to bring before the Court that if this man cannot spell a name to write on a stake, how he can make out the names on the stakes.

The COURT.—If it is for that purpose you may ask the question.

(Testimony of Fritz Block.)

Q. (By Mr. de JOURNEL.) Are you quite sure that there was not "Dome Creek" written on that stake?

A. I didn't examine to see that. All the writing I couldn't make out.

Q. In large letters, very distinctly; it was not there, was it?

A. What do you mean?

Q. In large letters "Dome Creek," written in very large plain letters.

A. I told you once I couldn't make out what was there.

Mr. de JOURNEL.—That is all.

Mr. McGINN.—That is all.

RALPH HATTON, a witness on behalf of the defendants, after being sworn, testified as follows, to wit:

Direct Examination.

By Mr. McGINN.—What is your name?

A. Ralph Hatton.

Q. Where do you live?

A. On Dome Creek.

Q. How long have you resided on Dome Creek?

A. Most of the time for the past two years.

(Testimony of Ralph Hatton.)

Q. Are you acquainted with the property in controversy in this action?

A. I am somewhat.

Q. When did you first see creek claim No. 6 above discovery on Dome Creek?

A. It was about the first week in December two years ago.

Q. 1904? A. Yes, sir.

Q. What were you doing at that time?

A. I was looking for No. 5 bench.

Q. First tier? A. First tier, yes, sir.

Q. Did you see any of the stakes of creek claim No. 6? A. I did.

Q. What stakes did you see at the lower end?

A. The trail run right by the upper stake.

Q. Where did the trail run?

A. It came right across.

Q. Do you mean the upper center stake?

A. Yes, the trail came down the draw, what they call 6 Pup and it run right close to the end line of 6 creek, winds right up on the bench and then it run straight on down the creek, not straight but leaning towards the hill a little as it gradually went down.

Q. Did you see any of the lower and stakes on that claim at that time? A. I did.

Q. What ones?

(Testimony of Ralph Hatton.)

A. I saw the center stake and I saw the corner.

Q. What was upon the center stake?

A. It was describing that it claimed 1320 feet upstream and 330 feet upon each side of the center stake.

Q. Any name signed?

A. James Funchion for J. C. Ross; Herbert Wilson, witness.

Q. (By the COURT.) What stake was that?

A. The downstream center stake.

Q. (By Mr. McGINN.) From there where did you go, or what other stake did you see?

A. I went straight towards the hill.

Q. Was there a line along there at that time?

A. There was a slight line, yes, sir.

Q. I mean a blazed line.

A. Well, it was blazed and partly cut out; the larger trees were blazed and the smaller brush was cut down.

Q. Where did that line lead to?

A. It went straight towards the hill to where there were two stakes, or three stakes; not close together, but there were three stakes in that vicinity.

Q. Did you see Zimmerman's stake?

A. I did.

Q. Did you examine it?

(Testimony of Ralph Hatton.)

A. Well, I looked at it until I saw whose it was.

Q. Did you see any stake there or any writing upon any stake there showing that it was the corner—

Mr. CLAYPOOL.—We object to that as leading.

(Objection sustained.)

Q. (By Mr. McGINN.) Did you see anything on any stake there that showed in any way that it was connected with No. 6 above discovery on Dome Creek?

(Plaintiffs object as leading; overruled; exception.)

A. There was a stake there about 4 or 5 feet, I should judge, from Mr. Zimmerman's stake, a small stake about two and a half inches square, I guess.

Q. What writing, if any, was there on that stake?

A. There was "Down stream right limit corner post of No. 6 creek claim" upon it.

Q. (By the COURT.) How far away from Zimmerman's was that?

A. About 4 or 5 feet; something near that.

Q. In what direction?

A. A little bit down the creek and a little bit down towards the creek.

Q. Nearer the center stake?

A. Yes, sir. Like it would be kind of that way (showing).

(Testimony of Ralph Hatton.)

Q. Zimmerman's stake would be off that way?

A. No, the corner stake I saw of 6 creek claim would be a little down the creek and a little towards the creek from Zimmerman's stake.

Q. That stake would be nearer to the center stake of No. 6 creek claim than Zimmerman's stake?

A. Just a little, sir.

Q. Did you see this stake that they now claim to be the northwest corner stake of creek claim No. 6; the stake in controversy in this action?

A. You mean the uphill corner stake?

Q. The lower uphill right limit corner stake?

A. I saw the stake, sir.

Q. When? A. That same time.

Q. What, if any, writing did you see on it?

A. Well, I saw on the downstream side "Corner stake of 5 bench," and on the upper side I saw it was where Fritz Block had staked a claim for McQuillan.

Q. Did you see anything else upon that stake?

A. No, sir.

Q. Did you see at that time the words "Dome Creek" upon it?

A. Well, the word "Dome Creek" was on the stake, but it was on one of those notices there.

Q. In connection with the other notices?

A. Yes, sir.

(Testimony of Ralph Hatton.)

Q. Did you see anything upon that stake that referred to creek claim No. 6?

Mr. CLAYPOOL.—The same objection as leading. (Overruled.) A. No, sir.

Q. (By Mr. McGINN.) Or that referred to creek claim No. 5? A. No, sir.

Q. Have you any interest in this action in any way? A. I have not.

Mr. McGINN.—You may cross-examine.

Cross-examination.

(By Mr. de JOURNEL.)

Q. When was it that you saw that?

A. About the first week in December.

Q. What year? A. Two years ago; 1904.

Q. What size was that stake that you saw which purported to be the lower right limit stake of 6 creek claim?

A. It was a small stake about two and a half inches square, I should judge.

Q. What kind of writing was on it?

A. Well, I should judge it was under the average man's writing a little. It was not extra handwriting, and it was not very awful poor.

Q. Was it the same writing that you saw on the center stake of that 6 creek claim?

(Testimony of Ralph Hatton.)

A. I should say not.

Q. Why? It was not as good a writing, not as fluent? A. No, sir.

Q. Is it there now?

A. Well, there is a little of it.

Q. What became of the rest; faded?

A. It must have faded.

Q. When did you see it last?

A. I was there about three or four days ago.

Q. For the purpose of refreshing your memory?

A. Looking at the stakes, sir.

Q. And you are quite sure it was the same stake?

A. It is.

Q. And you made out part of the writing that you saw in December, 1904, on it?

A. I did not. I didn't make out but very little of it, and that was right down at the lower end of the writing, nearly at the lower end of the place.

Q. It is the same writing that was there in 1904, only faded.

A. What was left looked to be.

Q. The rest was faded? A. Yes, sir.

Q. Not cut off or anything like that?

A. No, it had not been cut out.

Q. And your memory is quite correct about what you saw on that stake in December, 1904?

A. Yes, sir.

(Testimony of Ralph Hatton.)

Q. Tell us again what you saw.

A. The down stream right limit corner stake of No. 6 creek claim.

Q. All that was written on that stake?

A. It was.

Q. What else besides that?

A. That is all.

Q. You said "James Funchion" I thought.

A. No, sir, I did not not. That was on the center stake.

Q. What was on the center stake?

A. It was describing his claim 1320 feet upstream and 330 feet each side of his post.

Q. And "James Funchion"?

A. "James Funchion." I don't know whether it was "John C. Ross" or "Jack Ross," and "Herbert Wilson, witness."

Q. "James Funchion for Jack" or "John C. Ross, Herbert Wilson, witness." A. Yes, sir.

Q. Is your memory on that as good as it is as to what you saw on the corner stake?

A. I should think so.

Q. Was "James Funchion" in the same handwriting as "Ross" was?

A. I couldn't swear positively, but I think not.

Q. And was the name "Herbert Wilson" in the same handwriting as the body of the notice?

(Testimony of Ralph Hatton.)

A. It seemed to be.

Q. You heard the testimony that Mr. Wilson wrote that notice?

A. I heard part of his testimony; I didn't hear all of it.

Q. Were you here when he was upon the stand?

A. Just when he first went on.

Q. You heard him say that he wrote that notice. You were sitting there.

A. I think so. I think I was here when he first started.

Mr. de JOURNEL.—That is all.

Mr. McGINN.—That is all.

HENRY COOK, a witness on behalf of the defendant, after being sworn, testified as follows:

Direct Examination.

By Mr. McGINN.—What is your name?

A. Henry Cook.

Q. How long have you lived on Dome Creek?

A. Pretty near two years; a year and 11 months.

Q. When did you first become acquainted with creek claim No. 6 above discovery on Dome Creek?

A. About two years last New Year's.

Q. What were you doing out there at that time?

A. I went out there to sink a couple of holes on 3 above creek.

(Testimony of Henry Cook.)

Q. For whom? A. For Clark.

Q. In whose name was No. 5 staked?

A. It was staked in Clark's name too, a relative of his, this man Clark.

Q. Who did you make the arrangement with?

A. I made it with C. B. Clark.

Q. You know the property in controversy in this action? A. Yes.

Q. When were you first upon it?

A. A year and 11 months ago, somewhere along there.

Q. Did you ever see any of the lower stakes of that claim? A. Yes, sir.

Q. What stakes did you see?

A. I seen them all.

Q. At the lower end? A. Yes, sir.

Q. Did you see the center stake? A. I did.

Q. What was on it?

A. The initial stake called for 1320 feet upstream by 330 feet on each side, on No. 6 creek claim, and the same on No. 5. The same stake was used by the both claims, No. 6 and No. 5.

Q. From that up here in a northerly direction, state whether or not at that time a line ran.

A. Yes, there was a small line from there. It is a brushy scrubby spruce, no very big timber there.

Q. What month was this?

(Testimony of Henry Cook.)

A. This was along about the first of January, 1905.

Q. Where did that lead to?

A. Right to No. 6 creek claim corner where Zimmerman's initial stake stands now.

Q. Do you know the line that is cut out there?

A. That has been cut out there recently.

Q. That has been recent? A. Yes, sir.

Q. How recently?

A. That has been cut out; a lot of lines cut out there since that.

Q. At that time was there any other line cut out?

A. None at all.

Q. State whether or not there was a line cut out from that center stake to that stake which Funchion and the plaintiffs in this case claim?

A. None at all. You mean that corner stake that is in dispute now?

Q. Yes, that is in dispute.

A. There was none. I want to explain about that line that was cut from this center stake to this corner stake.

Q. All right. Go right on.

A. It is through green little spruce and it is a very old blaze. If a man doesn't look very carefully he won't see the blazes.

Q. Why.

(Testimony of Henry Cook.)

A. On a green tree, where it is not cut off, but just cut or blazed, the bark will grow over and the blaze will grow out on a green tree.

Q. At that time you could see the blazes distinctly?

A. It could be seen by looking carefully.

Q. And you say you saw a corner stake of 6?

A. Yes, sir.

Q. Where was that with reference to the Zimmerman stake?

A. It was right close by there.

Q. How do you know that it was the corner stake of No. 6? A. Because it was on there.

Q. What writing was on it?

A. Claiming corner stake of No. 6 above.

Q. Was it plain to be seen at that time?

A. No, not very plain, but by looking very carefully you could see it.

Q. Do you know this stake that has been spoken of here which McQuillan's name was written on?

A. Yes, sir.

Q. When did you first examine that post?

A. I seen that post there the same time.

Q. What writing did you see upon it?

A. I saw McQuillan's name upon it.

Q. Did you see any other writing on it?

(Testimony of Henry Cook.)

A. There was a little writing facing down towards the creek.

Q. What was that?

A. The corner stake of No. 5 bench.

Q. Did you examine it carefully to see whether there was any other writing on it?

A. There was none there at all excepting McQuillan's and this.

Q. Was there a blazed line extending from the center stake of creek claim No. 6 up to that stake?

A. No.

Q. At that time? A. There was not.

Q. When did you first see a blazed line running up there?

A. Well, when McPike and Funchion came over there in April, 1905. I seen them over there.

Q. What did they do at that time?

A. They cut the lines out on No. 6 above, No. 2 above, No. 4 below and No. 4 above.

Q. And since that time there has been trouble with all those claims about the boundaries of those claims?

Mr. CLAYPOOL.—We object as immaterial. (Sustained.)

Q. (By Mr. McGINN.) You say they cut the lines of No. 6 at that time? A. Yes, sir.

(Testimony of Henry Cook.)

Q. What lines did they cut?

A. They cut them all.

Q. What did they do with reference to that stake, if you know.

A. They cut McQuillan's name off and Funchion put his name on facing upstream, claiming the corner of No. 6; and Clark put his name on facing down stream claiming corner for No. 5. At that time I was up at a tent there were a fellow named Hall and Biggs had a tent. They were sinking on 5 bench. I was up there and Clark came along and said "Gentlemen, I want to inform you that you are on my ground here—

Mr. CLAYPOOL.—We object to this as immaterial.

Mr. McGINN.—Don't say anything about it then.

Q. You examined the stake at that time, did you?

A. Yes, me and Hall together.

Q. What did you see on it?

A. I saw Funchion's name and Clark's name on it.

Q. Is that the first time you ever saw that written there? A. That is the first time.

Q. Had it been there before Funchion and McPike went out? A. No, sir.

(Testimony of Henry Cook.)

Q. Was there anything on that stake prior to that time that referred to No. 5 creek claim or No. 6 creek claim? A. No, sir.

Mr. McGINN.—You may take the witness.

Cross-examination.

(By Mr. de JOURNEL.)

Q. What were you doing at that time on that particular group?

A. Biggs and Hall had a boiler there belonging to Barnette and I was wanting to get it. That is what I was doing up there.

Q. They had relocated all these upper claims?

A. No, they had located this what they claim.

Q. They had relocated that? A. Yes, sir.

Q. And you had relocated all the Dome Group?

Mr. McGINN.—We object to that as immaterial. (Sustained.)

The COURT.—Go far enough to show what he was doing there.

By Mr. de JOURNEL.—To show some bias also.

Mr. McGINN.—If you can show bias, go ahead.

Q. (By Mr. De JOURNEL.) You are the relocator of that Dome Group running from 1 below to 5 below? A. Yes, sir.

(Testimony of Henry Cook.)

Q. Mr. Funchion is the owner of No. 4 creek claim below, is he not?

A. Yes, he and two other partners.

Q. And your lines conflict with his there, do they not? A. Not at all.

Q. I thought you said something about trouble?

A. I didn't say anything about trouble.

Q. Are you not in conflict with them on No. 4 below? A. With who?

Q. With James Funchion?

A. No, I am not.

Q. Don't your line of the group that you relocated for Mr. Barnette and yourself—

Mr. McGINN.—We object as assuming something which he knows is not true.

Mr de JOURNEL.—I am going to show bias.

The COURT.—Proceed.

Q. (By Mr. de JOURNEL.) You said that Mr. McPike and Mr. Funchion cut out the name of McQuillan there. Did you see them do that?

A. No, I did not.

Q. What made you say they cut it out?

A. It was cut off; somebody cut it off, and they put their names there.

Q. And you concluded from that that they cut it off? A. Yes, sir.

(Testimony of Henry Cook.)

Q. What was on that upper corner there prior to their alleged cutting?

A. On what corner do you mean.

Q. The upper corner that the McQuillan name was on. A. What was on there?

Q. Yes, was "McQuillan"? A. Yes, sir.

Q. On what face? It was faced on four sides?

A. It was facing up creek.

Q. It was facing upstream?

A. Yes, McQuillan's name was.

Q. And what else was on the other three faces?

A. There was the corner stake of No. 5 bench; that is all that was on that stake.

Q. That was looking which way?

A. It was looking a little towards the creek; a little angling towards the creek.

Q. The corner of 5 bench? A. Yes.

Q. It was not looking towards the bench then.

A. It was looking towards the bench and towards the creek too.

Q. And what was on the other faces, nothing?

A. Nothing.

Q. Not a thing? A. Nothing.

Q. No old writing or anything? A. No.

Q. Perfectly blank, but faced.

A. Not faced very much, no.

Q. How many faces on that post, four or two?

(Testimony of Henry Cook.)

A. It carried two at that time.

Q. It didn't carry four faces? A. No.

Q. It wasn't faced on four sides at that time?

A. No, sir.

Q. Do you remember the full name of McQuillan? A. "F" something; I didn't remember.

Q. Was it "Frank" written there?

A. I couldn't say; it might be Frank McQuillan.

Q. Or would it be "F. X."?

A. I don't know that.

Q. You remember "F" distinctly?

A. Yes, sir.

Q. Do you remember "McQuillan"?

A. Yes, sir.

Q. It was very plain?

A. Plain enough so a man could read it.

Q. Any other claim made on it, claiming upstream?

A. Yes, claiming this bench, No. 6 bench.

Q. In what words?

A. 1320 feet upstream by 330 feet on each side.

Q. That was written on—

A. On that post.

Q. Was it signed "McQuillan" or signed by Fritz Block for McQuillan?

A. Signed by Block.

Q. With his name? A. Yes.

(Testimony of Henry Cook.)

Q. For McQuillan? A. For McQuillan.

Q. Can you tell us what was written on that stake that you claim was the corner at that time of the Funchion location?

A. Down by Zimmerman's post?

Q. Yes.

A. Claiming No. 6 corner post; lower corner post of No. 6 above creek claim.

Q. Corner post of No. 6 above creek claim?

A. Yes, sir.

Q. How big was the stake upon which that was written? A. Two or three inches.

Q. Any name? A. No, there was no name.

Q. There wasn't the name of Funchion there?

A. No, sir.

Q. Or of Ross? A. No.

Q. No name whatever? A. No.

Q. And was that post faced on four sides too?

A. Yes.

Q. Anything else on any face? A. No.

Q. That was all there was?

A. That was all.

Q. No other location notice on it? A. No.

Mr. de JOURNEL.—That is all.

Mr. McGINN.—That is all.

E. G. HALL, a witness on behalf of defendant, having been sworn, testified as follows, to wit:

Direct Examination.

(By Mr. McGINN.)

Q. What is your name?

A. Edward G. Hall.

Q. What is your business at the present time?

A. I am guard at the federal jail.

Q. Are you acquainted with the property known as No. 6 above discovery on Dome Creek?

A. I know of it. I know where it is, yes.

Q. When did you first become acquainted with that property? A. In March, 1905.

Q. I will ask you whether or not you are one of the locators of the Banner Group?

A. Yes, sir.

Q. I will ask you whether or not you assisted in the location of that group? A. I did.

Q. With whom? A. Frank Biggs.

Q. Did you examine any of the stakes at the lower end of creek claim No. 6 about the time that you staked the Banner Group? A. I did.

Q. What stakes did you examine?

A. I examined one stake that had Zimmerman's name on, a small stake, down a little ways from a stake. It had F. X. McQuillan's name on it. That was right on the trail.

(Testimony of E. G. Hall.)

Q. How far was that from Zimmerman's?

A. At the lower end of 6.

Q. How far from Zimmerman's stake?

A. That I couldn't tell; a little distance from it up the hill.

Q. Would you say about 135 feet?

A. Yes, I should say all of that; probably more. I didn't measure it.

Q. What was upon that stake? On that McQuillan stake?

A. "F X. McQuillan" and the notice of location claiming so many feet upstream and so many feet each side of the stake; 330 feet I think it was each side of the stake and 1320 feet upstream.

Q. Was there any other writing upon that stake?

A. I didn't look at any other writing, read any other writing. I just read this location. It was a stake that didn't amount to anything. I had nothing to do with it, the claim I was staking, therefore I didn't. I didn't see any other writing. There was a little writing on the lower end next to the creek, but I didn't read what it said. It was some corner stake. I saw it said "Corner stake" but I didn't read any more of it.

Q. You paid no attention to that?

A. I paid no attention to it.

Q. You say you saw Zimmerman's stake?

(Testimony of E. G. Hall.)

A. Yes, sir, his was a similar stake, down towards the creek further.

Q. Did you see the center stake of creek claim No. 5, the upper center stake? A. Yes, sir.

Q. And that is the same stake that marked the lower end of creek claim No. 6, is it not?

A. No. 5? On No. 5 center stake he claimed 330 feet on each side of the stake. I was speaking of No. 5 creek claim now.

Q. What did you do? Did you go about 330 feet from there?

A. I measured from that stake 330 feet up with a tape line.

Q. State whether or not you made any search around there at that time for the purpose of finding out whether or not there was a corner stake there?

A. I did.

Q. Did you see any blazed line?

A. There was a very dim line blazed.

Q. From that center stake? A. Yes, sir.

Q. To where?

A. Up to about where the corner stake of Mr. Zimmerman was.

Q. Did you follow that blazed line?

A. Yes, sir.

Q. Did you measure it? A. Yes, sir.

(Testimony of E. G. Hall.)

Q. With what?

A. With a tape line.

Q. Tell the Court if you made careful search at that point to see if you could find any corner stake of creek claim No. 5.

A. I looked and searched around. I wanted to find the stake. I found there were two other stakes set there by Zimmerman's, near Zimmerman's, right around in a group there. One of them I think was the corner stake of No. 5 creek claim, one was claiming a fraction between the creek claim 5 and No. 5 bench by Wilson.

Q. Did you see any other stakes there?

A. No, not that I remember seeing.

Q. Did you see anything there at that time that would lead you to believe or would indicate to you in any way that this McQuillan stake up there was a stake of creek claim No. 5 or of creek claim No. 6?

A. No, sir.

Q. I will ask you to state whether or not a prospector who is in good faith searching to determine the boundary lines of that claim could have ascertained that that was a corner stake of that creek claim No. 6.

Mr. de JOURNEL.—It seems to me that that is a question for the Court to determine.

(Testimony of E. G. Hall.)

The COURT.—The Court might hear the conclusion of a miner even if the Court does have to determine it. Objection overruled.

A. I took that for the location stake of McQuillan for No. 6 bench claim; that it was what it was; it was his center stake; it was no corner stake.

Q. (By Mr. McGINN.) Could you in any way have discovered that that was the corner stake of No. 6 creek claim? A. No, I could not.

Q. You were trying to determine the boundaries of creek claim No. 5 at that time, were you not?

A. I was.

Mr. McGINN.—You may cross-examine.

Cross-examination.

(By Mr. de JOURNEL.)

Q. That was in the spring of 1905, was it not?

A. Yes, when I staked that group.

Q. That Banner Group was a relocation over all the individual locations over there.

A. Yes, sir.

Q. How many stakes were there at the place where you saw Mr. Zimmerman's stake?

A. I think there were three.

Q. One was the corner, you told us, of creek claim No. 5.

A. Yes, and one was Zimmerman's corner stake.

(Testimony of E. G. Hall.)

Q. And the third one was the fraction claimed by Wilson.

A. Yes, sir, that is all I remember of seeing. After I found the stake I was looking for, I didn't have no business with the others.

Q. How many faces were cut, blazed, on that upper corner stake which you thought at the time was the center stake of the McQuillan claim?

A. It was blazed, hacked on the side upstream where McQuillan's name was.

Q. Looking upstream?

A. Yes, sir. And on the down stream side where that little writing was on, that was hacked very little; and the side facing downhill was hacked a little, but no writing on it; and no writing on the upper side, and I don't think the upper side was hacked.

Q. There were three faces to that.

A. You couldn't call it three right good faces that you could write on; there were two faces that you could write on. It was just hacked.

Q. The only thing you could see was McQuillan's location on one face? A. Yes, sir.

Q. And on the other face some faded writing.

A. Yes, sir.

Q. And you couldn't see what it was.

A. No, I couldn't make out what it was. In fact, I didn't bother to read it. I saw McQuillan's name and I know F. X. McQuillan, and I thought he had let it run out and I was going to stake it. I saw Mr. Zimmerman working there. That is all I had to do

Mr. de JOURNEL.—That is all.

Mr. deJOURNEL.—That is all.

Mr. McGINN.—That is all. We rest.

Defendants rest.

Here the Court takes a recess until 10 A. M. tomorrow, namely, November 22d, 1906.

Morning Session.

Nov. 22, 1906, 10 A. M.

Trial resumed.

Mr. CLAYPOOL.—The Jackson plat was introduced and admitted for the purpose of illustration in the case. We used Plaintiffs' Exhibit "A" and Defendants' Exhibit "B"; the first being map of survey by Mr. E. G. Allen, and the second I mentioned being the map made by Mr. Robe. I should like to have an understanding with counsel now if both these maps may be admitted in evidence.

Mr. McGINN.—I understood that they were both admitted by the Court for the purposes of illustration, but not as substantive testimony.

Mr. CLAYPOOL.—Is that the limit of admission?

The COURT.—Yes; that is the limit.

Mr. CLAYPOOL.—Mr. Wolcott has found his notes of the deposition of John Bush, the introduction of which we reserved as a part of our main case. The notes have not been transcribed, but are to be read, if it is agreeable. The signing of the deposition was waived, and we will ask Mr. Wolcott to read the deposition at this time.

(Here Mr. Wolcott reads the deposition of John Bush, as follows:)

[Title of Court and Cause.]

Deposition of John Bush.

Deposition of John Bush, taken at the instance of the plaintiffs, before E. T. Wolcott, a notary public in and for the District of Alaska on September 19, 1906, at 3 P. M., at the offices of Messrs. Claypool, Kellum & Cowles, in the building of the Fairbanks Banking Company, on 2d avenue, in the town of Fairbanks, in the presence of C. E. Claypool, Esq., and F. de Journel, Esq., attorneys for the plaintiffs, and John L. McGinn, Esq., attorney for the defendant.

JOHN BUSH, a witness on behalf of the plaintiffs, after being sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name? A. John Bush.

Q. Where do you live?

A. On 10 below Cleary, I have been making my home this summer.

Q. In the Fairbanks Recording District, Territory of Alaska? A. Yes, sir.

Q. How long have you been in this recording district? A. Since the winter of 1902.

Q. Are you acquainted with that placer mining property situate on Dome Creek in this recording district, known as creek placer mining claim, numbered 6 above discovery on Dome Creek?

A. Yes, sir.

Q. Are you acquainted with that other placer mining claim, known as No. 5 above discovery on Dome Creek, first tier of benches, right limit?

A. Yes, sir.

Q. You may state when you first became acquainted with placer mining claim last mentioned, No. 5 first tier, right limit, about when?

A. In the fall of 1903, about November some time.

Q. Whose claim is that?

(Deposition of John Bush.)

A. The creek claim?

Q. No, the bench claim No. 5.

A. No. 5 belongs to Herbert Wilson now.

Q. Whose was it originally?

A. I staked the claim.

Q. About that time?

A. The 18th of November, I think, 1903, or maybe the 28th.

Q. (Mr. McGINN.) You staked it for Wilson?

A. No, sir, for myself, and Wilson got a half interest.

Q. And you have since sold your half interest to Wilson?

A. I have sold my half interest to Wilson.

Q. Look at the plat which I now show to you, being Exhibit "A," which I now hand you, I direct your especial attention to the corner marked on said plat "Northwest corner." You may state what relation that bears, if any, to the bench claim which you say you staked.

A. The bench claim corners with this.

Q. What corner of the bench claim is the corner marked on this exhibit "Northwest corner"?

A. That would be the southeast corner.

Q. What marks that corner now?

A. A corner stake; the original corner stake.

(Deposition of John Bush.)

Q. What kind of a stake is that, Mr. Bush?

A. A tree cut off and squared up for a corner stake.

Q. What stake marked that corner at the time that you staked the bench claim described. The same stake that is there now?

A. Yes, the same stake.

Q. That has been there all the time?

A. Yes, sir.

Q. You may state whether or not you have examined that corner recently?

A. I examined that corner. I was there two weeks last Sunday. That was on a Sunday; two weeks last Sunday .

Q. Sunday the 26th of August?

A. I think that is the Sunday; I think that was it.

Q. You may state what was the conditions of that corner at that time?

A. That corner? There was only the one stake there at that time, and I used that.

Q. I mean at this last examination.

A. Well, now, there is quite a good many posts around; I guess there are 6 or 8 posts around there.

Q. But this particular post, I refer to.

A. In what condition was it?

(Deposition of John Bush.)

Q. Yes.

A. It is still standing there, but I think one side looks as though it had been whittled off with a penknife or something another.

Q. Did you observe anything on the last visit as to the markings on that stake?

A. Yes, sir, some fresh markings.

Q. What were they?

A. I judge it must have been done with what we call a lumber pencil, on the Sound, a large pencil or chalk mark.

Q. Do you know what the marks were?

A. Jimmy Funchion said it was the surveyor's mark.

Q. Did you observe Jackson's name?

A. I think Jackson's name was on the stake.

Q. Were there any of those blue marks, or chalk marks, on any other stakes in that vicinity?

A. I think not; not if I remember right.

Q. Did you observe any notice on the stake originally when you staked the bench claim?

A. Oh, yes.

Q. On which face of the post was the notice?

A. If I remember right it was on the face next to the creek.

Q. Down towards the creek?

A. Yes, sir, on this inside.

(Deposition of John Bush.)

Q. You adopted that as the corner of your bench?

A. Yes, sir, corner of 5 bench.

Q. Is that corner there now as it was then; the corner of the property you staked? A. Yes, sir.

Q. Has any change, other then the blue marks you have described, been made in that stake?

A. As I say, one side of that stake looks as though it had been whittled off with a penknife.

Q. Which side was that, the down creek, or facing to the creek?

A. If I remember right the face next to the creek. I wouldn't be sure about that, but I think it is.

Q. Do you know where the shaft known as the Zimmerman shaft is located with reference to this corner?

A. It would be inside of this line, I should judge, about there some place (showing).

Q. Inside of the north line? A. Yes, sir.

Q. Approximately as indicated upon the exhibit?

A. Yes, sir, in that neighborhood. I know it was not far from this line across the creek, nor far from that line.

Q. It is not far from the north line and from the west line, is that correct?

A. Yes, sir, that is what I mean by that, the west line and the north line.

(Deposition of John Bush.)

Q. How long did you remain there on that creek or in that immediate vicinity after staking the bench that you have described?

A. When I was doing the assessment work on this 5 creek claim, I worked 11 days on that 5 creek claim at that time.

Q. And then went elsewhere?

A. Yes, sir, then came over to Goldstream.

Q. When did you go back then to this property or to its immediate vicinity?

A. I was over there in the summer of 1904.

Q. For how long?

A. Well, I think I was over on Dome creek two or three times that summer.

Q. And in the immediate vicinity of this property?

A. Yes, sir, I went to this 5 creek claim.

Q. And was that the last time that you were there for any length of time?

A. No, I have been there every summer since.

Q. For how long at a time?

A. I have not been there very long at a time. We got the assessment work done each year on this creek claim, and I went over to look at the claim.

Q. Two or three days at a time or a week?

A. Yes, mostly I would go across here, and sometimes go down below and stay with some of the

(Deposition of John Bush.)

boys on the creek, and so on, go past the claim back and forth.

Mr. CLAYPOOL.—You may cross-examine.

Cross-examination.

(By Mr. McGINN.)

Q. When did you say you were first upon Dome Creek? A. In the fall of 1903.

Q. At the time that you staked this claim?

A. Yes, sir.

Q. And you staked this claim in your own name?

A. Yes, sir.

Q. How long did you stay there at that time?

A. I was there, I think, 12 or 13 days. I know I worked 11 days on this No. 5 creek.

Q. Why did you do the assessment work in 1903, if you staked in 1903?

A. I had a half interest in 5 creek claim, and I was doing the assessment work on that claim.

Q. You left there in October, did you?

A. I think I said November.

Q. When were you next upon the property?

A. After that November?

Q. Yes.

A. I was there in the summer of 1904.

Q. How long were you there in the summer of 1904?

(Deposition of John Bush.)

A. I just made trips over there and back.

Q. You were not there upon the claim more than one day at any one time? A. No, sir.

Q. About how many times in all were you there in 1904?

A. In 1904 I don't think I was there over two or three times; I might have been more, because I went back and forth each summer over to Dome Creek, as I say.

Q. In 1905, how many times were you there?

A. I think I was to Dome Creek two or three times in 1905.

Q. Were you there for more than one day at a time, or just over there and back the same day?

A. I would stay a day on Dome Creek.

Q. Where does the trail run along there?

A. When I went over there, generally I came down to the creek above this. I would strike the creek sometimes on 6 here, and sometimes I would come to the creek further up. We went across the head of Little Eldorado and then we could drop down into Dome any place we liked.

Q. The trail didn't go any where near the northwest corner stake of No. 6 as you fixed it on that map did it?

A. Within the last year they have cut a trail just above this trail, just above the north line, but be-

(Deposition of John Bush.)

fore that in going over there I generally dropped down to the creek where we had a kind of a foot trail.

Q. After you located this property in 1903, when did you next see this northwest corner stake of No. 6 creek claim as you have described it in your direct examination?

A. Well, I think I saw it most every time I was over there.

Q. Why would you go and look at it?

A. From this fact: We had some assessment work done here on 5, and often times went up past there.

Q. When did you next see it?

A. After what time?

Q. After October or November, 1903?

A. I think I saw it each time that I was over; well, I might have seen it every other time you might say.

Q. You took particular pains to go and look at it? A. No, sir.

Q. Did you examine the writing on it?

A. I did when I staked the bench.

Q. At any other time did you examine any other writing on it?

A. I don't know as I went to examine the writing in particular.

(Deposition of John Bush.)

Q. What writing did you see upon the stake when you first saw it?

A. When I first staked the bench?

Q. Yes.

A. I saw Wilson's handwriting on that stake.

Q. Anything else?

A. My own was on one side of it, for this bench.

Q. But did you see any other writing on the stake?

A. I think, if I remember right, at the time that was the only writing that was on there.

Q. The writing that you put on?

A. Yes, and what Wilson put on, at that time.

Q. What writing did Wilson put on, if you know? A. For the corner stake on 6 bench.

Q. How do you know that?

Q. (By Mr. CLAYPOOL.) For 6 bench?

A. Wilson, I think, wrote that notice for 5 and 6; the two locations were on it, for 5 creek and for 6 creek.

Q. Do you know that, or is this just your opinion at this time?

A. I am positive of that.

Q. What was written on it then?

A. It was written on it, "Corner stake," I think, "No. 5 creek" then, "Corner stake of No. 6 creek."

Q. In whose handwriting?

(Deposition of John Bush.)

A. Wilson's, I think. I think the handwriting was all his.

Q. You are positive of that? A. Yes, sir.

Q. You are positive that the handwriting that you saw upon that stake that is designated upon the map as "Northwest corner of No. 6 creek claim" was in the handwriting of Wilson?

A. Yes, sir.

Q. And that upon that stake, in addition to what you wrote on it, appeared the handwriting of Wilson specifying that it was the northeast corner stake of No. 5 and the northwest corner of No. 6 creek claims? A. Yes, sir.

Q. Did you see any other stakes about the point indicated upon the map where this red line meets this black one here?

A. There is a little bit of a swale comes right across here and, at the time we done this assessment work, Wilson went from this center stake across there and found that that was too wide and he thought at that time that a man couldn't hold only 330 feet from the center stake, and so staked a fraction.

Q. In whose name was the creek claim staked?

A. Which creek claim?

Q. No. 5. A. In Sid Clark's.

Q. When did Wilson stake this fraction there?

(Deposition of John Bush.)

A. Well, on or about the same time that I staked the bench.

Q. On the same day?

A. No, I hardly think so. I think it was a day or two after that.

Q. And he used a stake here, did he, marked on the map "Zimmerman's southwest corner"?

A. I think that is the place.

Q. Do you know what he wrote on that stake?

A. I think it was a fraction. I think he staked a fraction off of here, thinking that the claim was too wide.

Q. Is the writing which you placed upon that stake and which you saw upon the stake the first time you saw it, still there?

A. No, sir, the writing is faded or blotted out. It is worn off by the weather.

Q. Do you know what the distance of that stake is from the initial or lower center stake?

A. No, I never measured it, but I think it is considerable over the 330 feet.

Q. Do you know what was written upon the initial stake?

A. That is the center stake here at the lower end?

Q. The lower center stake.

(Deposition of John Bush.)

Q. (Mr. CLAYPOOL.) Marked "Initial" wrongly there.

A. It would be the lower center stake of No. 6?

Q. Do you know what was written upon it?

A. I think "Initial stake of No. 6 creek claim."

Q. (Mr. CLAYPOOL.) Initial or Lower Center?

A. Initial or lower center stake of No. 6 creek claim.

Q. Did it designate the number of feet claimed on each side?

A. Three hundred and thirty feet, I think.

Q. About 30 feet from there, where would that bring you with reference to the point marked on this map as "Zimmerman's southwest corner"?

A. Well, the distance in walking across, I should think it was along there in that neighborhood.

Q. Were there any lines blazed there in 1903 or 1904?

A. The lines were blazed so we could follow them out.

Q. Indicate where the lines were blazed.

A. The line was blazed right out to this corner stake.

Q. (By Mr. CLAYPOOL.) "Northwest corner stake? A. Yes, sir.

(Deposition of John Bush.)

Q. You are sure of that? A. Yes, sir.

Q. You cannot be mistaken about that?

A. We followed the line right out.

Q. In 1903? A. Yes, sir.

Q. Don't you know that that line wasn't blazed until last year?

A. We followed it right out and commenced from there and used that for the corner stake of the 5 bench.

Q. You are positive that that line was blazed at that time, and not blazed last year for the first time?

A. I am positive that that line was blazed enough so a man could follow it.

Q. What do you regard that?

A. In early times in staking here we would often stake claims and blaze the bushes along, small trees, just blaze them with an axe as we went along.

Q. There were not any trees cut down.

A. No, I don't think the trees were cut down.

Q. The trees were marked along?

A. Blazed along, yes, sir, so a man could follow them.

Q. Did you examine any of the other stakes of 6 creek claim?

A. No, not across the creek on this opposite side. Well, I have been to this lower corner, the southwest corner.

(Deposition of John Bush.)

Q. You say that that stake has been changed?

A. That corner stake?

Q. Yes.

A. No, sir, I don't think it has ever been changed.

Q. Has it ever been effaced in any way?

A. Defaced?

Q. Yes.

A. Only one side, like as though it had been whittled off with a penknife or something like that.

Q. You are sure that that is the stake you adopted?

A. The original corner stake, yes, sir.

Q. It is a tree, is it?

A. It is a tree cut off.

Q. Is your writing still on it?

A. You can't see but very little of the writing, it is almost obliterated.

Q. You are sure the writing you saw on it was Wilson's handwriting?

A. I am sure it was Wilson's handwriting, because he writes a heavy hand mostly.

Q. You are well acquainted with his handwriting?

A. Yes, sir, there is only a little of it you could see, but there is enough of it so I am positive it is Wilson's handwriting.

HERBERT E. WILSON, a witness in behalf of plaintiffs, called in rebuttal, being sworn, testified as follows:

Direct Examination.

Q. (Mr. de JOURNEL.) You have heard the testimony about that corner stake?

A. Yes, sir.

Q. That upper corner stake which we contend to be the original, and I believe you stated that you wrote the location notice on the initial stake, and also on the lower right limit corner stake?

A. I did.

Q. Have you seen this upper corner stake since?

Mr. McGINN.—We object to that, as the witness has testified upon his direct examination in regard to that.

The COURT.—I understood he testified that he had seen it.

Mr. McGINN.—And he testified as to what was on it.

Mr. de JOURNEL.—Yes.

The COURT.—Proceed. The Court heard him say that he had seen it and that he wrote on it.

Mr. McGINN.—We object, as he has already testified to it.

(Testimony of Herbert E. Wilson.)

(Objection overruled; defendants except.)

Q. (Mr. de JOURNEL.) Is it there still?

A. Part of it is.

Q. What part?

A. Well, "Dome Creek" is very distinct in my handwriting.

Q. Where is it on the post?

A. It is on the creek side of the post.

Q. Is the same writing there now that was put on by you at that time?

Mr. McGINN.—We object, as already testified to.

(Objection overruled; defendants except.)

A. I have not written on the stake since.

Q. I ask you if it is the same as was put by you on that date upon the stake.

A. I say I guess it is; I have not written on it since.

Mr. de JOURNEL.—With the leave of the Court, I would like to go into the explanation of that fraction stake by Mr. Wilson.

The COURT.—You may do so.

Q. (Mr. de JOURNEL.) You heard the testimony of Mr. Bush? A. Yes, sir.

Q. Can you explain to the Court what took place with reference to the fraction stake?

(Testimony of Herbert E. Wilson.)

A. I staked a fraction there.

Q. Why did you stake a fraction?

A. Well, 5 creek claim, and 6, were both staked too wide—the creek claims; and at that time I thought that a person could not hold over what they claimed on the stakes, three hundred and thirty feet, and I staked a fraction; but atferwards I learned that the Court would not give a man any ground unless it was over twenty acres, so I failed to record it, did not take any more notice of it; just staked it and let it go.

Q. The 5 and 6 creek claims had a common center post, did not they?

Mr. McGINN.—We object to that, as calling for a conclusion of the witness.

The COURT.—Yes, but objection overruled.

(Defendants except.)

A. Yes, sir.

Q. They had a common center stake?

A. Yes, sir.

Q. And a common upper corner right limit stake?

Mr. McGINN.—Same objection.

(Objection overruled; defendants except.)

A. Upper corner of 5 and lower corner of 6.

Q. There was only one stake? A. Yes.

(Testimony of Herbert E. Wilson.)

Q. So both were the same distance on the right limit? A. Both were the same.

Q. Did you record that fraction?

A. I did not, sir.

Q. Where were your stakes of that fraction, if you can show them on the map?

Mr. McGINN.—We object to that as immaterial.

(Objection overruled; defendants except.)

A. Well, it was on 5 that I staked the fraction; I didn't stake it on 6; I staked from this corner here and put the stake down here. (Showing.)

Q. From this corner "A"? A. Yes, "A."

Q. To where?

A. To somewhere down here. (Showing.)

Q. What distance, about?

A. About a hundred and fifty or two hundred feet.

Q. Extending along 5?

A. Extending along 5; and I left that stake as it was and put a small stake down here (Showing), and claimed a fraction of two hundred feet more or less, I think it was.

Q. Did you record that?

A. I did not, sir.

Q. When was that that you staked that, can you recollect about the date?

A. No, but I think it was in the spring of 1904.

(Testimony of Herbert E. Wilson.)

Q. Did you see any stake of Mr. Zimmerman around there? A. No.

Q. It might possibly have been before Zimmerman staked? A. It might.

Q. You have heard him state when he did stake?

A. Zimmerman?

Q. Yes.

A. Zimmerman staked in April 1904.

Mr. McGINN.—On May 12th.

The WITNESS.—Somewhere around there.

Q. (Mr. de JOURNEL.) Would it be before or after that?

A. I could not tell you; I forgot really when it was. I took very little interest in the fraction after I found out that I could not hold it—that the claim was less than twenty acres.

Q. You did not see any stake around there, did you? A. No, sir.

Q. You heard the testimony of Mr. Zimmerman and his witnesses? A. I did; yes, sir.

Q. Is it at all possible that Mr. Funchion or yourself would have put some stake where the Zimmerman stake now is or within fifty feet of that?

Mr. McGINN.—We object to that.

The COURT.—Yes.

(Testimony of Herbert E. Wilson.)

Q. (Mr. de JOURNEL.) Is there any possible mistake? I want to show whether they could have made a mistake.

The COURT.—Proceed. Objection overruled.

Q. Is there any possibility of a mistake upon your part there?

A. That upper corner is undoubtedly the stake; no question about that.

Q. Is there any possibility of your having put that stake anywhere near Zimmerman's stake?

A. The only stake I remember was the stake for the fraction—a little stake I put out there.

The COURT.—Was it a stake or a tree cut off?

A. Your Honor, I forget.

Q. (Mr. de JOURNEL.) Why is it not possible? How does the country lie there?

Q. (Mr. McGINN.) Anything is possible.

The COURT.—Yes, ask him what the facts are, as nearly as you can get the facts.

Q. (Mr. de JOURNEL.) What is the lay of the country there?

The COURT.—I believe what Mr. Wilson says, so there is no use going further in that line.

(Testimony of Herbert E. Wilson.)

Q. (Mr. de JOURNEL.) You heard Mr. Zimmerman claim that he was with you when this fraction was staked?

A. I heard Mr. Zimmerman say so; yes, sir.

Q. Did he say anything to you at that time about having a corner post near where you staked your fraction?

A. Mr. Zimmerman did not say anything about it.

Q. Did he tell you at any time that he claimed part of 6 creek claim?

Mr. McGINN.—We object to that as immaterial and not proper rebuttal.

The COURT.—The objection may be overruled.

(Defendants except.)

Q. (Mr. de JOURNEL.) Did he make any claim to any part of 6 creek claim, at any time within your hearing, while he was with you?

A. I don't know; I believe that Mr. Zimmerman owned 6 bench at that time.

Q. But about 6 creek claim—did he make any claim?

A. He did not say anything at all about 6 creek claim; no, sir.

The COURT.—I do not understand that he claims to claim any of 6 creek claim now. He says a cer-

(Testimony of Herbert E. Wilson.)

tain part of it is within his bench, and the other people say a certain part is within the creek claim.

Q. (Mr. de JOURNEL.) You heard the testimony of Mr. Hall?

A. Mr. Hall? I do not know which is Mr. Hall.

Q. He was one of the men who staked the Banner group.

A. Yes, I heard some of his testimony.

Q. Where are the Banner group's lower stakes; where do they claim there?

A. You mean their upper corner stakes?

Q. No; their lower corner stake?

A. I do not know, sir.

Q. Do you know where their stakes are at all?

A. I do not, sir.

Q. If the upper corner stake, which is common between 5 and 6, was proved in this case to be at the place contended for by Mr. Zimmerman, what influence would that have on your interest in 5 bench and 5 creek claim?

A. It would give me that much more ground; it would give me that much more of the bench, but I would lose it on the creek claim; I own a half interest in the creek.

Q. How much in the bench? A. All of it.

(Testimony of Herbert E. Wilson.)

Q. And if that stake was shown to be where Zimmerman claims it to be, that would practically give you the pay all to yourself, instead of one-half of it?

A. It would give me more in the bench; the pay has not all been demonstrated yet.

Q. It would give you a hundred and fifty feet more?

A. On the bench, on the upper line.

Q. So your testimony is detrimental to you in that measure?

A. Well, I own a half of the creek claim.

Q. And the whole of the bench? A. Yes, sir.

Mr. de JOURNEL.—You may cross-examine.

Cross-examination.

Q. (Mr. McGINN.) Do you say it is to your interest at this time to have the corner of bench claim No. 5, or of the creek claim, established where the Zimmerman stake is?

A. Yes, sir, I consider it that way.

Q. You will have a lawsuit with the Banner group upon that property?

A. I do not think I will.

Q. You know there is a conflict between you?

A. Not with me; I have not been sued.

Q. You know there is a conflict and you expect there will be a suit almost any time?

(Testimony of Herbert E. Wilson.)

A. No, I do not think they will ever get to it.

Q. You know there is a question out there as to whether the shaft of the Banner group is within the boundaries of No. 5?

A. There is no question in my mind about that.

Q. You think it is within the boundaries of the creek claim? A. I know it is on the creek claim.

Q. You contend, therefore, that the discovery shaft of the Banner group being on creek claim No. 5, which is a valid and subsisting location—that their discovery is no good?

A. I do not know anything about that.

Q. Do you mean to tell the Court at this time that there is no difference between you and the Banner group in regard to bench claim No. 5, first tier?

A. I do not; I have not been sued.

Q. You mean to tell the Court that you do not know anything about any conflict between you people? Answer my question.

A. I am doing it; I want to tell the Court that I have not been sued.

Q. I ask you whether or not there has been any conflict, not saying whether you have been sued or not.

A. There is no conflict, so far as I am concerned.

Q. You staked this fraction in February, 1905, did not you? A. Did I say in 1904?

(Testimony of Herbert E. Wilson.)

Q. Yes.

A. I believe I meant 1905; I will apologize.

Q. You had been down on creek claim No. 3 shortly before that time, and seen Mr. Cook and Mr. Zimmerman down there?

A. In the creek claim?

Q. Yes; they were living in a tent there, were not they, or in a cabin on No. 3 creek claim?

A. I was down to 3, but I don't ever remember of seeing this Cook.

Q. You do not ever remember seeing him?

A. No.

Q. Do you remember them showing you any gold-dust down there? A. No.

Q. —that Zimmerman found?

A. In the 3 cabin?

Q. In the 3 cabin; that he showed you gold-dust in a bottle down there that Zimmerman had found on his property?

A. Zimmerman showed me gold, but I think it was up in his cabin on 6.

Q. You are not positive about that?

A. Well, I am pretty positive that it was in his own cabin that he showed me some gold.

Q. You say it was not in the cabin on 3?

A. I do not think so.

(Testimony of Herbert E. Wilson.)

Q. Was not it immediately after that that you staked this fraction?

A. I do not know whether it was or not.

Q. Was not it immediately after that and upon the strength of the gold that Zimmerman showed you that you staked this fraction?

A. No, sir.

Q. Why did you stake it?

A. Because it was too wide.

Q. What induced you at that time? Is that the first time that you discovered it was too wide?

A. It was the first time I took much notice of it.

Q. Was that the first time you discovered that?

A. I knew it was too wide.

Q. When did you first discover that?

A. I discovered that in 1903.

Q. At the time you staked the claim?

A. Oh, no.

Q. In 1903?

A. The following fall when I was doing the assessment work.

Q. Did you ever examine the lines of No. 5 creek claim? A. No, but I stepped them off.

Q. When? A. Several times.

Q. When was the first time you did that?

A. In 1903 and in 1902.

Q. In 1902 when you staked it?

(Testimony of Herbert E. Wilson.)

A. No; when I staked it I did not measure it very carefully.

Q. In 1902 you staked it? A. Yes.

Q. And then you discovered that the lines were out too far? A. In 1903.

Q. And you did not draw them in?

A. I did not.

Q. And you supposed that a man could only hold three hundred and thirty feet?

A. I thought it was that way then.

Q. Why did not you draw in your stakes?

A. I did not want to.

Q. Why?

A. Because I had staked the fraction; the claim did not belong to me.

Q. You did not stake the fraction until 1905?

A. I think it was in 1905.

Q. In 1903 you knew that that claim was too wide? A. Yes, sir.

Q. And you never wanted to stake that fraction?

A. Not until 1905.

Q. And you knew all that time that that claim was too wide, and you knew there was a fraction along there? A. That is why I staked it; yes.

Q. Was not it after Mr. Zimmerman showed you this gold, and upon the strength of that, and of this claim being too wide, that you staked this fraction?

(Testimony of Herbert E. Wilson.)

A. Yes, sir.

Q. You staked that in February, 1905?

A. Yes, sir.

Q. And upon the twenty-fifth day of March, 1905, the Banner group was staked?

A. I do not know when the Banner group was staked.

Q. You do not know that to be a fact?

A. No.

Q. Was not it on account of the staking of the Banner group that you failed to record your notice of location of this fraction?

A. Nothing of the kind.

Q. You owned, at that time, a half interest in creek claim No 5 and the whole of bench claim No. 5?

A. Yes.

Mr. McGINN.—That is all.

Redirect Examination.

Q. (Mr. de JOURNEL.) Did you own the whole of the bench at that time? A. No, sir.

Q. When did you come to acquire the ownership of the rest?

Mr. McGINN.—We object to that as immaterial.

(Objection overruled; defendants except.)

A. This summer.

(Testimony of Charles B. Clarke.)

Q. From whom? A. John Bush.

Q. What time of the year?

A. I think it was in August some time, or in July, 1906.

Mr. de JOURNEL.—That is all.

CHARLES B. CLARKE, a witness in behalf of the defendants, called in rebuttal, being sworn, testified as follows:

Direct Examination.

Q. (Mr. de JOURNEL.) State your full name.

A. Charles B. Clarke.

Q. Where do you live?

A. In the Fairbanks mining district.

Q. Where?

A. On 4 Goldstream, as a rule.

Q. Where did you live in 1903?

A. On 4 Goldstream and Chena.

Q. In 1903? A. Yes, sir.

Q. Were you on Dome Creek in 1903?

A. Yes, sir.

Q. When?

A. In the latter end of November, 1903.

Q. I presume you have heard some of the testimony in this case? A. Yes, sir.

(Testimony of Charles B. Clarke.)

Q. Do you know about the stakes and boundaries of 6 creek claim? A. Yes, I do.

Q. The right limit lower stake and the boundary?

A. I do.

Q. When did you see it for the first time?

A. 1903.

Q. What did you see there, so you could trace that boundary—by what monuments, if any?

A. When I went over there I took Ross to Funchion's camp.

Mr. McGINN.—We object, as not proper redirect testimony.

(Objection overruled; defendants except.)

A. (Continuing.) —I was going to represent 3 and 7 Dome; so in coming down the creek, I went down the creek bottom down to 3, and there were several places where there was water, like there is today, and in coming back I took the bench and found there a trail of somebody and followed that up through the center; and coming on up, I passed the corner stake of Nos. 5 and 6, and then kept up on the side line until I came to the camp again, or opposite, and went over, and told Burgess, who was with me, that we better use that trail. From there I went up to 7 and found where I was to represent. After we moved down to 3, I used to represent on 7

(Testimony of Charles B. Clarke.)

every day; and came up and put in a fire and took it out and I would pass that stake four times a day.

Q. You passed that stake four times a day for how many days?

A. I should judge eleven, twelve or fourteen days two or four times a day; not necessarily four times—sometimes four times, sometimes three or two times a day.

Q. What kind of a stake was it?

A. A squared tree about four feet high.

Mr. McGINN.—We object to all this, as not proper redirect examination.

(Objection overruled. Defendants except.)

Q. What size?

A. About four inches; four or five inches; a fair sized tree.

Q. Did you see what was written on it?

A. Yes, sir, at that time.

Q. What was it?

A. "Corner stake of 5 and 6 right limit Dome Creek."

Q. In what kind of a handwriting was "Dome Creek"?

A. Well, the handwritng—I was interested in all the claims on Dome and Wilson seemed to do all the writing—I judge it was Wilson's, but I am not an expert in handwriting.

(Testimony of Charles B. Clarke.)

Q. You know his handwritng?

A. Yes, I recognized it on all the stakes; I judge it was the same man.

Q. Look at that map. You have already testified that you know the lay of the ground? A. I do.

Q. Do you see a point marked "A" and a point marked "C" there? A. Yes, sir.

Q. Now what point would it be where you saw that stake?

A. This would be the stake here, "A."

Q. That is the stake you saw in 1903?

A. That is the stake that I saw.

Q. That is the stake you refer to in your testimony?

A. Yes; it is not the stake three hundred and thirty feet away from the center stake.

Mr. de JOURNEL.—That is all.

Cross-examination.

Q. (Mr. McGINN.) You are interested in 5?

A. Yes, my brother owns the claim and I represent him, as his agent.

Q. There is a conflict between you and the Banner group, is not there? A. Not yet.

Q. Do not you know that the Banner group lines are down upon what you claim to be your property?

(Testimony of Charles B. Clarke.)

A. I believe the Banner group is sinking a hole upon my property; yes, sir.

Q. You know there is a conflict between you?

A. Not yet; I do not see it.

Q. You understand by "conflict" that I mean the institution of an action?

A. I do, most assuredly.

Q. You do not understand that by the word "conflict" is meant an overlapping of boundaries or anything of that kind?

A. The conflict they could have is sinking a hole on my ground.

Q. Do their boundaries overlap upon you?

A. Yes, sir.

Q. And there is a conflict between you to that extent?

A. No; they have not said anything.

Q. You know they claim down that far?

A. I suppose they do claim down that far.

Q. Do not you know, as a matter of fact, that they do?

A. As a matter of fact I do not know that they claim it; I suppose so, but they have not got it.

Q. They claim it and you claim it?

A. I know I claim it.

Q. And you know they claim it?

(Testimony of Charles B. Clarke.)

A. I suppose they do.

Q. So there is a conflict between you to that extent?

The COURT.—That is an argument.

Q. It is very much to your interest to have this corner stake established where you placed it?

A. Not unless it is correctly established, because I have lost so many claims that if that was not right I would not care.

Q. It would not make any particular difference to you?

A. No, I have lost so many that I am getting used to it.

Mr. McGINN.—That is all.

JOHN McKAY, a witness in behalf of plaintiffs, called in rebuttal, being sworn, testified as follows:

Direct Examination.

Q. (Mr. de JOURNEL.) What is your name?

A. John McKay.

Q. You are a miner? A. Yes, sir.

Q. Were you living on Dome Creek?

A. Yes, sir.

Q. You have heard the testimony of Mr. Zimmerman in regard to his sinking on the ground in contest here—on that strip of ground—and also his tes-

(Testimony of John McKay.)

timony regarding the locating of pay on 7 above, on the claim above; now, do you know when he began to sink?

A. I could not say for sure, but I think it was around on or about the first of June.

Q. What year? A. This last summer.

Q. Do you know when pay was located on 7?

Mr. McGINN.—We object to that as immaterial.

The COURT.—I do not think it is very material, but the objection may be overruled.

Mr. McGINN.—We except.

Q. (Mr. de JOURNEL.) Did he sink that before the pay was located on 7?

A. I think it was after.

Mr. McGINN.—We move that what the witness thinks be stricken out.

The COURT.—The Court will not give it very great weight.

Q. (Mr. de JOURNEL.) Are you sure, or do you only think?

A. It was afterwards; yes, sir.

Mr. de JOURNEL. That is all.

(Testimony of John McKay.)

Cross-examination.

Q. (Mr. McGINN.) The fact that pay was struck on 7 showed that it went right through this disputed strip? A. I don't know.

Q. It was liable to swing off in places in between there? A. I suppose so; yes.

Q. So that was really nothing very much to show to Mr. Zimmerman that the gold was going through this disputed strip?

Mr. de JOURNEL.—We object.

(No answer.)

Mr. McGINN.—That is all.

JAMES FUNCHION, a plaintiff, recalled in rebuttal in behalf of plaintiffs, testified as follows:

Direct Examination.

Mr. CLAYPOOL.—At the time that you and McPike cut the lines about No. 6 creek claim, as you have testified, did you know where Mr. Zimmerman claimed his stake to be?

A. No, sir, I did not.

Q. When did you first have any personal knowledge of any other stakes, referring to 6 creek claim, down inside of what you now claim to be your lines?

(Testimony of James Funchion.)

Mr. McGINN.—We object to that as immaterial and not proper rebuttal.

(Objection overruled. Defendants except.)

Q. (Mr. CLAYPOOL.) Down from the point "A," being the post in controversy?

A. At the time I cut the lines out I did not know it was Mr. Zimmerman's corner, because it stood down fifty feet further down the gulch—

Q. When did you first know there was any such thing as Zimmerman's corner?

A. I did not know it until I took Mr. Jackson out there to survey it.

Q. I asked you when you first knew of any other corner being there.

A. When McPike and I cut that trail I ran across his stake up there.

Q. You may describe that stake to the Court.

A. It was a small little stake about two inches through, and it was down two hundred feet or more from our corner, right down towards the creek claim, and I could not make out the writing on it, but Mr. Zimmerman and I, this fall, when we were talking about surveying the ground, had a talk over that stake and I asked him what stake that was, and he told me that was the stake that was put there by the

(Testimony of James Funchion.)

man that staked the No. 6 bench before he did, which I found out yesterday was Block.

Q. For McQuillan?

A. Yes; that he used our corner stake.

Mr. McGINN.—We object to that as immaterial and not proper rebuttal.

(Objection overruled. Defendant excepts.)

Q. (Mr. CLAYPOOL.) Were you able to make out anything on this stake at all?

A. No, I could not make out the writing on it; I know it was not the writing of Wilson and it was not mine.

Q. Was it any stake that you had placed there?

A. No, sir.

Q. Did you place it there yourself?

A. No, sir.

Q. Where was this stake situated with reference to what Mr. Zimmerman claimed to be his corner stake?

A. I should judge it to be down there about thirty or forty feet from where Zimmerman's corner is.

Q. Did you examine the stake that Mr Zimmerman now claims to be his corner at that time?

A. At the time that we cut the line?

Q. Yes.

(Testimony of James Funchion.)

A. No, sir, I did not see his stake then.

Q. Did you afterwards look at it?

A. I examined it when Jackson and I went there to survey.

Q. And you found it about thirty feet from this stake which you think was placed there by Block?

A. Yes, sir, about thirty feet from that one that I think was placed there by Block.

Mr. McGINN.—We move that what he thinks be stricken out.

(Objection overruled. Defendants except.)

Q. (Mr. CLAYPOOL.) What was on the stake when you saw it the first time?

A. As I said, I could not make the writing out at that time; it was dim; it was a green bit of a sapling —what no miner would use as a stake; I could not make the writing out on it.

Q. Was that the first time you had seen that stake?

A. I saw that when I cut the lines out with McPike.

Q. That was the first time you had seen it?

A. That was the first time I had seen it.

Q. Did Mr. Zimmerman ever point out or indicate to you where he claimed his corner to be?

(Testimony of James Funchion.)

A. He pointed it out to me when I took Johnson out to survey this claim.

Q. Was that the first time?

A. That was the first time; yes, sir, and at that time we had a conversation with reference to this stake which was thirty feet away and I asked him what stake that was, and he said it was a stake put in by somebody who had staked the bench before he staked it.

Q. Were there any other stakes about that stake of Zimmerman's?

A. There was a small tree, about an inch through, which stood close to Mr. Zimmerman's stake.

Q. How close?

A. It stood about a foot or a foot and a half from it.

Q. They were almost together?

A. Almost together.

Q. Was there anything on that stake?

A. No, sir, nothing on it; I asked Mr. Zimmerman was there anything on that stake of his and he said no, there was no writing on his stake?

Mr. CLAYPOOL.—That is all.

Mr. McGINN.—No questions.

Mr. CLAYPOOL.—That is our case.

A. ZIMMERMAN, a defendant, recalled in behalf of defendants in rebuttal, testified as follows:

Direct Examination.

Mr. CLAYPOOL.—We object to anything further.

(Objection overruled.)

Q. (Mr. McGINN.) You just heard the testimony of Mr. Funchion that you had a conversation with him in which you told him that some stake out there was Block's stake.

A. Yes, sir.

Q. Where was that stake with reference to your stake?

A. That is down in the gulch, probably fifty or sixty feet down towards the center.

Q. Towards the center stake of the claim?

A. Towards the center post from my southwest corner.

Q. Whose corner did you understand that to be?

A. Well, the time that I talked to him was the time that John Bush—when he showed John Bush around. It was not when Jackson was around there, because I was working when Jackson was around there and we never had a word.

Q. When was John Bush there?

A. That was the same Sunday after Jackson surveyed.

(Testimony of A. Zimmerman.)

Q. Some time in the month of August?

A. Yes, it was after Jackson surveyed; I believe in the fore part of September. I believe that is what he testified to in his deposition.

Q. He was out there about the twenty-ninth day of August; would that be about the time?

A. It must have been later. Jackson made the survey on the 26th.

Q. Whose stake did you understand that to be?

A. That was the corner post of Frank McQuillan's location.

Q. Of the claim Block had staked for McQuillan? A. Yes, sir.

Q. Do you testify that he used this stake in controversy in this action as his center stake, and this stake you pointed out to Funchion was his down hill corner stake?

A. Yes; his downhill corner stake.

Q. Did you ever tell Mr. Funchion that this stake that was about a foot and a half from your stake did not have any writing on it at the time you staked?

A. No; because there was writing on it; there was a notice on that, I know. It was a small post and it was mildewed on top, like all the notices. You see, a post gets wet on top, it gets water-soaked and mildewed; lower down it is dry and the writing can be seen.

(Testimony of A. Zimmerman.)

Q. Do you remember the time that Mr. Wilson staked a fraction out there? A. Yes, sir.

Q. When was that?

A. That was either on the twentieth or the twenty-first of February, 1905.

Q. Had you shown him any gold about that time?

A. Yes, sir.

Q. Where?

A. He came to my cabin over from Cleary and did not find me home, and he came down the creek.

Mr. CLAYPOOL.—We object to this as not responsive.

Mr. McGINN.—Read the question.

(Question read.)

A. (Continuing.) At Cook's cabin and at my cabin, too, but at Cook's cabin first; there is where he found me.

Q. When was it with reference to that that he stake this fraction?

A. He staked it the next day.

Mr. CLAYPOOL.—I think he has gone far enough in this matter. Mr. Wilson says that he only showed him gold once, but he does not remember about it.

(Objection overruled.)

Mr. McGINN.—That is all.

Mr. CLAYPOOL.—No questions. That is all.

The COURT.—In this case there is seemingly no question of discovery involved; both parties have made discovery apparently in good faith. There is no question of recording; everybody has recorded apparently in compliance with the law, And there is no question of staking or marking the boundaries; everybody has done that. The only question, as I discover it is whether or not the stake further up the hill at the lower end of No. 6, between 5 and 6, is the true stake, or whether the one 160 feet further down the hill is the true stake at the lower end.

I have watched all these witnesses very carefully, and so far as I can see they are all good men. I know most of them, and I believe what they say, but somebody is mistaken. I know Ralph Hatton pretty well and I believe he is an honest man. He said to the Court that 160 or 180 feet below this upper stake is a stake which is the corner stake between 5 and 6, and I believe that he believes that. Herbert Wilson says that 160 feet further up the hill is the true stake, and I believe that Herbert Wilson believes that. The Court has got to judge from that kind of testimony which of these stakes is the true one, and it is almost impossible for the Court to do so. I would do it, of course, if the matter was not susceptible of absolutely satisfying proof. The stakes are

there now and these men can go and look at them, and I am going to adjourn this case until next Wednesday morning, and I want Mr. Hatton and Mr. Wilson to go together upon the distinct understanding that upon their testimony the rights of their neighbors and friends to some extent at least rest. I want them to go in that kind of a spirit and examine these stakes. I want them to make a note while there together of what is on each stake. I want Mr. Wilson to examine each stake carefully to see whether or not he is mistaken, and I want Mr. Hatton in his presence to examine each one of these stakes to determine whether or not he is mistaken; and then come into Court and be examined on those matters. Mr. Hatton has been put forward as a witness for defendants as a man worthy of belief, and I know him to be such; and Mr. Wilson has been put forward by plaintiffs as such, and the same is true of him; and I believe that they will be perfectly conscientious and will report not their theories to the court, but the facts, and I would much rather trust the report that they will make than my own judgment from the testimony as it has been presented to me, because I should be compelled to find naturally against men whom I believe as witnesses, and I do not want to do that.

(Testimony of Herbert E. Wilson.)

(Here the Court taken an adjournment until December 1, 1906, at 10 A. M.)

December 1, 1906, 3:30 P. M.

Trial resumed.

HERBERT E. WILSON, having been sworn, testified as follows:

Direct Examination.

(By Mr. de JOURNEL.)

Q. Have you been on the ground in compliance with the order of the Court? A. Yes, sir.

Q. Will you tell us what was the result of your search on the ground.

A. I found the fraction stake, found the corner stake, and the stake Mr. Ralph Hatton said he mistook for the corner stake.

Q. Well, now, begin with the corner stake.

The COURT.—The Court is advised of all the corner stakes except this particular one at the lower right-hand corner.

Mr. de JOURNEL.—That will be the northwest corner.

The COURT.—Yes.

Q. (By Mr. de JOURNEL.) What did you find on the northwest corner stake being the right limit lower corner.

(Testimony of Herbert E. Wilson.)

A. I found the words "Dome Creek" in my handwriting on it.

Q. Are you quite positive it is in your handwriting?

A. I can swear to it, sir. I am positive.

Q. What other writing, if any, did you find on it?

A. None that I could make out. There were some scratches there, but faded. The "Dome Creek" is very distinct.

Q. You say that is your handwriting?

A. Yes, sir.

Q. When did you write that?

Mr. McGINN.—We went into all of this matter before.

Mr. de JOURNEL.—We want to identify it.

(Objection overruled. Defendants except.)

A. September 17th or 18th, 1902.

Q. Is it or is it not the corner stake established by you at that time?

Mr. McGINN.—The same objection.

(Overruled; exception.)

A. Yes, sir; it is.

Q. The same that you saw on that last examination? A. Yes, sir.

Q. You have heard of the defendant speaking with regard to the alleged corner stake of this claim

(Testimony of Herbert E. Wilson.)

as established by Mr. Funchion. Did you see the stake pointed out by Mr. Hatton?

A. I saw a stake that Mr. Hatton pointed out which he said he thought was the corner stake, yes, sir.

Q. How far downhill is that from that northwest corner stake that you have been just speaking about?

A. Quite a ways; I didn't measure it.

Q. About? A. A couple of hundred feet.

Q. (By the COURT.) How far down the hill from this claimant's corner?

Mr. McGINN.—Zimmerman's corner.

A. It is pretty close; I didn't measure it.

Q. (By the COURT.) About how far?

A. Well, I didn't give you a very correct answer to that, because I wasn't very particular about it, but about there close, within a few feet.

Q. (By Mr. de JOURNEL.) Within 10 feet?

A. I don't know. I have an idea. It is a little down stream from the other stake and a little towards the creek. I didn't pay very much attention to it.

Q. What size is the Zimmerman corner stake?

A. Zimmerman's corner stake would square about 3 inches.

(Testimony of Herbert E. Wilson.)

Q. What size is that little stake that Mr. Hatton pointed out to you as being the right limit corner of the Funchion claim?

A. Mr. Hatton wasn't sure that that was the corner.

Q. What size is that stake?

A. Just small; it will square about an inch.

Q. Did you examine the other stakes of that claim?

A. I looked at the center stake, yes, sir.

Q. Do you know what the size of the other stakes are, the other 5 stakes that are admitted to be the stakes of the Funchion-Ross claim?

A. I didn't go up to the upper line on this occasion.

Q. But you have on a previous occasion.

A. Yes, sir.

Q. What size are the other 5 stakes?

A. I don't know, sir, I didn't go up to the upper line at all.

Q. So you don't know?

A. No, sir, only the center stake, I know that is an exceptionally large stake; it is a tree.

Q. What size is the right limit lower corner stake that we claim?

(Testimony of Herbert E. Wilson.)

A. That would average three or four inches; good size; it is a tree.

Q. And the other lower corner, on the left limit?

A. That will go three inches.

Q. Did you examine the center stake?

A. Yes, sir.

Q. What markings did you find on that lower center stake?

A. I found my handwritng. I found the location notice of 5 above on one side, and the location notice of 6 above on the other side.

Q. You found the location notice of this claim on the other, the upper side?

A. On the upper side, yes, sir.

Q. What did you observe, if anything?

A. I found some of it in my handwriting, and some of it not; part of it was in my handwriting.

Q. And part of it was not?

A. And part of it was not.

Q. And part was your handwriting?

A. The upper part.

Q. Tell us what words were in your handwriting?

A. "Lower center stake No. 6 above."

Q. That was in your handwriting.

A. Yes, and I believe "Dome Creek" right underneath.

(Testimony of Herbert E. Wilson.)

Q. What was the part not in your handwriting?

A. It was the location notice proper.

Q. Tell the Court.

A. "I claim 1320 feet up and down stream and 330 feet on each side of the center stake."

Q. That was what was written on that lower center stake? A. Yes, sir.

Q. On the face facing the 6 claim? A. Yes.

Q. And that you claim was not in your handwriting?

A. No, it was not in my handwriting. I would like to state, your Honor, it looked like the lower writing had been written over; but it was not my handwriting. It looked though somebody had gone over it.

Q. Did you observe the upper center stake?

A. I didn't go to the upper center stake, sir.

Mr. de JOURNEL.—That is all.

Cross-examination.

(By Mr. McGINN.)

Q. You wrote upon the center stake, I believe you testified in your examination the other day, that you claimed 1320 feet up stream and 330 feet wide?

A. How is that?

(Testimony of Ralph Hatton.)

Q. You wrote that up the lower center stake that you claimed 1320 feet up stream and 330 feet on either side?

A. I said I wasn't sure whether it was 330 feet or 660 feet, but on the stake there now it says 330 feet.

Mr. McGINN.—That is all.

RALPH HATTON, having been sworn, testified:

Direct Examination.

(By Mr. McGINN.)

Q. Go on and tell the Court what you did out there and what you saw.

A. We didn't see a great deal. Mr. Wilson and I went up to No. 6 above and examined the right limit corner stake which he claimed was Funchion's, and examined the one I claimed was Zimmerman's, and examined the lower center stake of No. 6 creek claim; and all that could be seen on the right limit corner post that they claimed, was "Dome Creek" and a few other scratches there. You couldn't tell what they were meant for or anything. Upon the stake that I told him I claimed was the corner stake of 6 creek claim originally, you couldn't see nothing at all without you could make out a little scratch now and then right close together; but you couldn't

(Testimony of Ralph Hatton.)

make out a word. On the center stake we saw his writing on there, both for 5 and for 6; and, as for telling whether it was his writng or not, I am no expert in writing, and I don't know.

Q. You wouldn't pretend to say that it was or was not.

A. I wouldn't say it was or wasn't his writing, because I don't want it understood that I am an expert on writing at all.

Q. Did you examine the writing up on the stake they claim was Funchion's stake?

A. On the downstream right limit corner post the "Dome Creek" that was on that, and the "Dome Creek" that was on the upper center stake of 5 creek claim and "Dome Creek" that he wrote on a paper, only two of them compared; that is, what I would think compared.

Q. Which two?

A. That was on the center stake and on the piece of paper.

Q. How about the "Dome Creek" upon the lower uphill corner stake?

A. I didn't think that compared with the writing on the paper nor on the center stake.

Q. How was the spelling?

(Testimony of Ralph Hatton.)

A. On the center stake and on the piece of paper it was "Dome," and on the corner stake it was "Doome."

Mr. McGINN.—That is all.

Mr. de JOURNEL.—That is all.

Testimony closed.

The foregoing, from page 1 to page 171, includes all of the testimony and evidence introduced and used upon the trial of the above-entitled cause, and all the proceedings therein.

That after the conclusion of all the evidence in this case, the same was submitted to the Court for consideration, and thereafter, to wit, on the 23d day of January, 1907, before the findings of fact and conclusions of law were signed by the Court and filed with the clerk, the defendants requested the Court to make the following findings of fact, to wit:

[Title of Court and Cause.]

Defendants' Proposed Findings of Fact and Conclusions of Law.

"Be it remembered, that upon the 21st day of November, 1906, came on regularly for trial the above-entitled cause, Messrs. Claypool, Kellum and Cowles, and Ferdinand de Journel, appearing as attorneys for the plaintiffs, and Messrs. McGinn & Sullivan

appearing as attorneys for the defendants, and the Court, after hearing the testimony offered by both plaintiffs and defendants, and said cause having been submitted to the Court for determination and decision, now on this the 23d day of January, 1907, defendants, before any decision of the Court in writing has been made or filed with the clerk of the court, makes the following findings of fact and conclusions of law, and request the Court to make and sign the same as his findings of fact and conclusions of law:

1. That the defendant, A. Zimmerman, is now, and for a long time hitherto has been, the owner in fee as to all persons save and except the United States in possession an entitled to the possession of that certain placer mining claim described in the answer in this case, as bench claim No. 6 Above Discovery on the right limit, first tier of benches on Dome Creek, in the Fairbanks Recording District, Territory of Alaska, which said claim is marked upon the ground as follows: Commencing at a point designated upon Defendant's Exhibit 'B,' introduced upon the trial of said cause (reference to which is hereby made and leave asked that the same be incorporated in and made a part of the findings of fact in this case) by the letter 'C' from said point in a northerly direction uphill about 600 feet to the northwest corner stake of said claim; thence from said point 'C' north 85 degrees and 44 minutes east 1367.4 feet

to a point indicated upon said Defendant's Exhibit 'B' by the letter 'B.' Thence from said point B uphill and in a northerly direction 600 feet to a stake which marks the northeast corner stake of said bench claim No. 6, right limit; thence west about 1320 feet to the northwest corner of said claim.

2. That the defendant, A. Zimmerman, on the 12th day of May, 1904, and when the above-described property was open, unappropriated, vacant mineral land of the United States, and subject to entry for placer mining purposes, did enter upon, locate and segregate said land from the public domain by marking the boundaries of said location on the ground in such a manner that the same could be readily traced, to wit: By blazing a tree at the point indicated upon said plat by the letter 'C,' which marked the southwest corner of said claim and by writing upon said tree so blazed substantially that the said defendant Zimmerman claims 660 feet northerly and uphill from said tree and 1320 feet upstream for placer mining purposes, and by further marking the said claim by establishing a substantial stake at the point indicated upon the plat marked Exhibit 'B,' upon which he wrote that he claimed 1320 feet downstream and 660 feet uphill, and by further establishing a stake about 600 feet northerly from said point designated upon said plat marked Defendants' Exhibit 'B' by the letter 'B,' and upon which he wrote his

name and marked the same as his northeast corner stake, and by establishing a northwest corner stake at a point northerly about 600 feet from the point specified upon said plat by the letter 'C' and by cutting out and blazing the lines thereon; and did then and there so mark the boundaries of said claim upon the ground that the same could be readily traced.

3. That thereafter and within ninety days therefrom the said A. Zimmerman caused a notice of location of said claim to be recorded in the records of the Fairbanks Recording District, District of Alaska, in which said Recording District said claim was and is located, which location notice so recorded contained the name of A. Zimmerman as locator, the date of the location as May the 12th, 1904, and described said claim with reference to adjoining claims, so that the same could be readily identified.

4. That thereafter and in the month of June, 1904, the said Zimmerman made a discovery of gold within the exterior boundaries of the claim heretofore described, and ever since said time, and from the date of said location has resided upon said claim working and developing the same, and been in the actual possession thereof.

5. That ever since said 12th day of May, 1904, defendant Zimmerman has been and now is the owner in fee of said property and every part and parcel thereof.

6. That the plaintiffs herein did not at the time of the commencement of this action, nor since said time, or at any other time, own or have any estate, interest or claim in or to said property, or to any part or parcel thereof, and as a conclusion of law the Court

FINDS.

1. That the defendant Zimmerman is entitled to a judgment ordering and adjudging that he is the owner in fee as to the property set forth in his answer in said cause, and heretofore set forth and known and described as No. 6 first tier, right limit, above Discovery, on Dome Creek in the Fairbanks Recording District, District of Alaska, and that said defendant is entitled to the sole and exclusive peaceable and quiet possession of the same.

2. That the plaintiffs herein have no estate, right, title or interest in and to said property or to any part or portion thereof, and that the defendant Zimmerman is entitled to a judgment that the plaintiffs recover nothing by this action and that said plaintiffs have no right, title or interest in and to said property, and that the defendant Zimmerman is the owner and entitled to the possession of the whole of the property heretofore described and particularly to that portion of the same which the plaintiffs seek to recover in this action.

3. That a judgment be entered in accordance herewith."

Which findings of fact and conclusions of law the Court refused to sign as the findings of fact and conclusions of law in the above-entitled cause. To which ruling of the Court the defendants then and there excepted and an exception was then and there allowed by the Court. And thereupon, the defendants requested the Court to make a finding as set forth in paragraph I of said proposed findings of fact which the Court refused to do, to which ruling of the Court the defendants excepted and an exception was duly allowed by the Court. And, thereupon, the defendants requested the Court to make a finding as is set forth in paragraph 2 of said proposed findings of fact hereinbefore set forth, which the Court refused to do, to which ruling of the Court, the defendants then and there excepted, and an exception was allowed by the Court. And thereupon the defendants requested the Court to make a finding as is set forth in paragraph 3 of said proposed findings of fact hereinbefore set forth, which the Court refused to do, to which ruling of the Court the defendants excepted and an exception was then and there allowed by the Court. And, thereupon, the defendants requested the Court to make a finding as is set forth in paragraph 4 of said proposed findings of fact, which the Court refused to do,

to which ruling of the Court the defendants then and there excepted, and an exception was allowed by the Court. And thereupon the defendants requested the Court to make a finding as is set forth in paragraph 5 of said proposed findings of fact hereinbefore set forth, which the Court refused to do, to which ruling of the Court defendants then and there excepted and an exception was allowed by the Court. And thereupon the defendants requested the Court to make a finding as is set forth in paragraph 6 of said proposed findings of fact, which the Court refused to do, to which ruling of the Court the defendants then and there excepted and an exception was allowed by the Court.

That before the findings of fact and conclusions of law were signed and filed in this case, the defendants requested the Court to find as conclusions of law as is set forth in paragraphs 1, 2 and 3 of defendants' proposed findings of fact and conclusions of law as heretofore set forth, which the Court refused to do, to which ruling of the Court the defendants then and there excepted and an exception was then and there allowed by the Court.

That thereupon, and before the findings of fact and conclusions of law were signed in this case, the defendants requested the Court separately to make the findings of fact and conclusions of law requested by the defendants as hereinbefore set forth, which

the Court refused to do, to which ruling of the Court the defendants then and there excepted and an exception was then and there allowed by the Court.

That, thereupon, and before the findings of fact and conclusions of law were signed in this cause and after the Court had refused to make the findings of fact and conclusions of law requested by the defendants as hereinbefore set forth, the defendants requested the Court to make the following findings of fact, to wit:

[Title of Court and Cause.]

Findings of Fact Requested by Defendants.

"Come now the defendants and without waiving the objections heretofore made to the proposed findings of fact and conclusions of law presented by the plaintiffs, and without waiving any rights as to their request for findings of fact and conclusions of law as heretofore made and filed with the clerk of the above-entitled court, request and ask the Court that if the Court shall refuse to sign such findings of fact and conclusions of law presented by the defendants herein and shall sign the findings of fact and conclusions of law presented by the plaintiffs, or other of similar purport thereto over the objection of the defendants, that the Court also find as follows:

1. That on the 12th day of May, 1904, the defendant, A. Zimmerman, a prospector by occupation, while searching for open mineral land of the United States for the purpose of locating the same, went upon Creek Claim No. 6 below Discovery on Dome Creek and saw the lower center stake thereof and then saw written thereon that the locator, Ross, claimed 1320 feet upstream and 330 feet on each side. That there was nothing written upon said stake to indicate that at a point 1320 feet up stream, or at a point 330 feet on each side thereof the said locator, Ross, had placed stakes or other monuments so as to mark the boundaries of said claim.

2. That the defendant Zimmerman after examining said lower center stake of said claim No. 6 below Discovery on Dome Creek, went to a point north one degree and two minutes east of said lower center stake 345.8 feet, and made an examination of said place, and did not see, nor was he able to find, any stake, or other monument which marked the northwest corner of said claim No. 6. But at said point he saw a small stake which he believed to be the northwest corner stake of said No. 6 below Discovery on Dome Creek, and so believing and at said point there being nothing to indicate where plaintiffs

claimed their northwest corner stake of said No. 6 was, established a stake being the southwest corner stake of bench claim No. 6 above Discovery on Dome Creek, right limit, and then proceeded and did mark the boundaries of his said claim as is set forth in the defendants' proposed findings of fact. That the country in and about said claim and in the vicinity thereof is covered with brush and timber, and the view from one corner of said claim to another so obstructed by intervening brush and timber, and at said time, to wit: On the 12th day of May, 1905, it was impossible to determine the boundaries of the claims upon said Dome Creek unless the stakes or posted notices indicated the extent the locator claimed, or unless the lines of said claim were blazed and cut so that they could be readily traced.

3. That the location as made by the said Ross in September of 1902 contained within its limits 21.641 acres, as will more fully appear from the map or plat offered, in evidence on the trial of this cause marked Defendants' Exhibit 'B,' which is hereby referred to for the purpose of more particularly showing the said excess.

4. That the said northwest corner stake of No. 6 above Discovery on Dome Creek as claimed by the

plaintiffs was about 480 feet in a northerly direction from the lower center stake upon which the said Ross had caused a notice to be written that he claimed 1320 feet up stream and 330 feet wide.

5. That the plaintiffs herein failed and neglected to file with the recorder of the Fairbanks Recording District within ninety days from the discovery of said claim a notice of location which contained the name of the locator, the date of the location and such a description of the claim with reference to natural objects and permanent monuments so that the same could be readily identified, but on the contrary said locator caused a pretended notice of location to be filed which fails to describe the property with reference to some natural object or permanent monument so that the same could be readily traced and which said notice of location claimed 1320 feet down stream from the upper center stake and 660 feet in width, as will more fully appear from said notice of location, a copy of which is herewith set forth, to wit:

'LOCATION NOTICE.

Notice is hereby given that I, the undersigned, has located twenty acres of placer mining ground on Dome Creek in the Circle Recording District, District of Alaska, as follows: Commencing at a stake

bearing location notice and adjoining No. 7 above Discovery; thence down stream a distance of 1320 feet to a stake, thence 660 feet in width to said claim. This claim to be known as No. 6 above Discovery on Dome Creek.

Located this the 18th day of September, 1902.

JOHN C. ROSS,
By his Attorney,
JAMES FUNCHION.

Witnesses:
HERBERT E. WILLSON.

Filed for record October 29th, 1902, at 1:30 P. M.
CHARLES ETHELBERT CLAYPOOL,
Commissioner and Ex-officio Recorder.
By J. Todd Cowles,
Deputy.'

If the Court does not desire to adopt any of the findings herein requested, then the defendants respectfully request the Court to make findings of similar import thereto, and if the Court does not so desire, then the defendants request the Court to make findings covering the particular points herein set forth as well as the points set forth in defendants' proposed findings heretofore filed.

McGINN & SULLIVAN,
Attorneys for Defendants.''

That the Court then and there refused to make findings of fact as are set forth in the defendants' re-

quest for findings as heretofore set forth, or findings of similar import thereto; to which ruling of the Court the defendants then and there duly excepted and an exception was then and there allowed by the Court to the refusal to make each, any or all of the findings therein contained or findings of similar import thereto.

That before the findings of fact and conclusions of law were signed by the Court in the above-entitled cause, the defendants duly filed and presented to the Court their objections to the findings of fact and conclusions of law, as follows:

[Title of Court and Cause.]

Objections to Findings of Fact and Conclusions of Law.

"Come now the above-named defendants and before the findings of fact and conclusions of law have been signed by the Judge of the above-entitled court as the findings of fact and conclusions of law in this cause, object to said findings of fact and conclusions of law, as follows:

1.

Defendants object to finding of fact No. 1, for the reason that the same is not supported by the evidence given upon the trial of the above-entitled cause, and is contrary thereto; and particularly to all that portion of said finding wherein it is stated

'that the plaintiffs duly staked said claim,' for the reason that the same is contrary to the evidence given upon the trial of said cause. Also to that portion of said finding wherein it is stated 'that thereafter said Funchion established his northwest corner stake, being the right limit corner stake by adopting the northeast right limit upper corner stake of creek placer mining claim No. 5 adjoining said claim No. 6, and marked the said stake as his right limit lower corner stake, the same being at about the distance of 1315.4 feet from his northeast upper corner stake,' for the reason that the same is not supported by any evidence given upon the trial of said cause, and is contrary thereto. Defendants object to that portion of said finding wherein it is stated, 'and ever since the year of location have expended more than one hundred (100) dollars each year in working and developing the claim as assessment work thereon,' for the reason that the same is wholly irrelevant and immaterial to the issues involved upon the trial of this cause as presented by the pleadings; and also to that portion of said finding that reads as follows: 'And had on the 29th day of October, 1902, duly filed their location notice,' for the reason that the same is a conclusion of law, and is not supported by any finding of fact. Defendants also object to that portion of said finding wherein it is stated 'that plain-

tiffs acquired title from the said John C. Ross by conveyance, and that the plaintiffs and their grantor ever since location thereof have been entitled to the possession of said claim,' for the reason that the same are conclusions of law, and not statements of fact.

2.

Defendants object to said proposed finding of fact No. 2 for the reason that the same contains conclusions of law, namely; wherein it is stated in said finding, 'that after the due location of said claim'; what being necessary to constitute a due location being a question of fact and law and the same should be separately stated.

Defendants also object to that portion of said finding wherein it is stated, 'while the plaintiffs were exercising dominion and control thereof, the defendants herein, by themselves, their servants, agents and employees entered upon the same at a point near the northwest corner thereof,' for the reason that the same is contrary to the evidence given upon the trial of said cause, is untrue, and furthermore, said finding of fact No. 2 is an apparent effort upon the part of the plaintiffs herein to make it appear that at the time the defendants went upon the property in dispute between the plaintiffs and defendants herein, that the plaintiffs were in possession of said creek claim No. 6 above Discovery on Dome Creek,

which is contrary to the evidence given upon the trial of said cause, and is contrary thereto.

4.

Defendants object to proposed finding of fact No. 4 for the reason that the same is irrelevant and immaterial to the issues in this case, and is not a finding upon a material issue presented by the pleadings or raised upon the trial, and is the setting forth of evidentiary matter.

5.

Defendants object to finding of fact No. 5 for the reason that the same is irrelevant and immaterial to the issues presented by the pleadings, or raised upon the trial of said cause.

6.

Defendants object to finding of fact No. 6 for the reason that the same is irrelevant and immaterial to the issues involved in the trial of this cause, and as being matters that occurred subsequent to the institution of this action.

And the defendants object to that portion thereof wherein it is stated, 'that said error and miscalculation in originally staking said claim was made and committed by said James Funchion without fraud but on the contrary in good faith and in the belief that the claim did not exceed twenty acres in area,' for the reason that the same is not supported by the

evidence given upon the trial of said cause, and is contrary thereto.

7.

Defendants object to finding of fact No. 7, for the reason that the same is irrelevant and immaterial to the issues involved in the trial of said cause, or as presented by the pleadings.

Defendants object to the conclusions of law as follows:

1.

Defendants object to said conclusion of law No. 1 for the reason that it is against the law, and is not supported by the findings of fact upon which the same is based.

2.

Defendants object to conclusion of law No. 11, for the reason that the same is contrary to the law, not supported by the findings of fact made and entered in the above-entitled cause upon which said conclusion of law was based, and has not been supported by any evidence given upon the trial of said cause.

3.

Defendants object to conclusion of law No. 3, for the reason that the same is contrary to the law and not supported by the findings of fact in the above-entitled cause.

McGINN & SULLIVAN,
Attorneys for Defendants."

Which said objections, and each and all of them, were overruled by the Court, and the findings of fact and conclusions of law submitted by the plaintiffs in this case over the said objections of the defendants were signed by the Court and filed with the clerk as the decision of the Court in the above-entitled cause. To which ruling of the Court in overruling said objections and making findings of fact numbers 1, 2, 3, 4, 5, 6 and 7, and in overruling the objections of defendants to each of said findings, as are set forth in said objections, the defendants duly excepted, and an exception was then and there allowed by the Court.

To the ruling of the Court in making the conclusions of law signed in this cause and numbered 1, 2 and 3, and in overruling the defendants' objections thereto, as set forth in paragraphs 1, 2 and 3 of the defendant's objections to the conclusions of law, as heretofore set forth, the defendants duly excepted, and an exception was allowed by the Court. And thereupon the defendants, before the conclusions of law were signed and filed in this case, requested the Court to make the following conclusions of law based upon the findings of fact made by the Court:

[Title of Court and Cause.]

Conclusions of Law Requested by Defendants.

"Come now the above-named defendants and without waiving any rights in regard to the proposed findings of fact heretofore requested by the defendants herein, and without waiving any objections heretofore filed by the defendants to the findings of fact and conclusions of law submitted by the plaintiffs, and which are to be adopted by the Court, hereby request that the Court make the following conclusions of law based upon the findings of fact that have been adopted by the Court herein:

And as conclusions of law the Court finds:

1.

That the defendant, Zimmerman, is now, and ever since the 12th day of May, 1904, has been, the owner in fee, in possession, and entitled to the sole and exclusive possession of that certain placer mining claim known as bench claim No. 6 Above Discovery on the right limit and first tier of benches, on Dome Creek in the Fairbanks Recording District, Territory of Alaska, which said claim includes within its boundaries the property in controversy between the plaintiffs and the defendants herein, which has been designated as the 'overlap,' and that the plaintiffs have no estate, right, title or interest in and to the same.

2.

That said creek placer mining claim No. 6 above Discovery on Dome Creek was and is void as to the excess over twenty acres, and as said excess was claimed by the defendant, Zimmerman on May 12th, 1904, he is now, and ever since said time has been, the owner in fee of the same and entitled to the sole and exclusive possession thereof.

3.

That the defendant Zimmerman is entitled to recover his costs and disbursements herein, and that judgment should be entered in accordance with these findings and conclusions.

McGINN & SULLIVAN,
Attorneys for Defendants."

Which the Court refused to do, to which ruling of the Court in refusing to make the conclusions of law based upon the findings of fact made by the Court herein as set forth in paragraph 1 in the defendants' request for conclusions of law as hereinbefore set forth, the defendant then and there excepted, and an exception was then and there allowed by the Court.

And to the ruling of the Court in refusing to make conclusion of law based upon the findings of fact made by the Court herein as set forth in paragraph in the defendants' request for conclusions of law, as heretofore set forth, the defendants then and there

excepted, and an exception was then and there allowed by the Court.

And to the ruling of the Court in refusing to make a conclusion of law based upon the findings of fact made by the Court herein as set forth in paragraph 3 in the defendants' request for conclusions of law, as heretofore set forth, the defendants then and there excepted, and an exception was then and there allowed by the Court.

And now, in the furtherance of justice and that right may be done, the defendants present the foregoing as their bill of exceptions in this case and pray that the same may be settled and allowed, and signed and certified by the Judge of this court who tried said cause, in the manner provided by law.

McGINN & SULLIVAN,
Attorneys for Defendants."

Service of a true copy of the foregoing bill of exceptions is hereby acknowledged this the 13th day of February, 1907, at Fairbanks, Alaska, by receipt of true copy thereof, duly certified to be such.

CLAYPOOL, KELLUM & COWLES,
By C. E. CLAYPOOL,
Attorneys for Plaintiffs.

[Title of Court ond Cause.]

Order Settling Bill of Exceptions.

Be it remembered that upon the 15th day of February, 1907, the above-named defendants presented the foregoing bill of exceptions to the Court for settlement, which said proposed bill of exceptions was served and filed within the time allowed by the orders of this court, which said bill of exceptions consists of the foregoing typewritten pages of the proceedings and testimony of the witnesses given by the respective parties upon the trial of said cause, as well as the exhibits and documentary evidence introduced upon said trial; and the original plats introduced upon the trial of this cause are hereby at the request of both parties attached to and made a part of this bill of exceptions, and are marked respectively Plaintiffs' Exhibit "A" and Defendants' Exhibit "B," for the purpose of identification;

And it appearing to the Court from an examination of the foregoing bill of exceptions, that the same contains all the evidence, testimony and exhibits introduced and given upon the trial of said cause, as well as the proceedings had therein not of record, and is in all respects true and correct.

Now, therefore, on motion it is hereby ordered, that the foregoing typewritten pages be and the same

are hereby approved, allowed and settled as the bill of exceptions in the above-entitled cause, and made a part of the record herein.

It is further ordered and adjudged that the foregoing bill of exceptions consists of all of the evidence, testimony, exhibits and proceedings had in the above-entitled cause, not appearing of record, and that the same is in all respects full, true and correct, and has been filed and presented within the time allowed by the orders of this court.

Done at Fairbanks, Alaska, this the 15th day of February, 1907.

JAMES WICKERSHAM,
District Judge.

Entered in Court Journal No. 7, page 238.

[Endorsements:] No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale, Plaintiffs, vs. A. Zimmerman, Ed. Wurzbacher, Roy Fairbanks, and Andrew Jack, Defendants. Bill of Exceptions. Filed in the District Court, Territory of Alaska, Third Division. February 15, 1907. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Assignment of Errors.

Come now the above-named defendants, being the plaintiffs in error, and file the following assignment of errors on which they will rely on their writ of error from the judgment made and entered by this Honorable Court upon the 2d day of February, 1907, in the above-entitled cause.

I.

The Court erred in refusing to make the findings of fact as set forth in paragraph 1 of defendants' proposed findings of fact and conclusions of law, which reads as follows:

"1. That the defendant, A. Zimmerman, is now, and for a long time hitherto has been, the owner in fee as to all persons save and except the United States in possession and entitled to the possession of that certain placer mining claim described in the answer in this case, as bench claim No. 6 above Discovery on the right limit, first tier of benches on Dome Creek, in the Fairbanks Recording District, Territory of Alaska, which said claim is marked upon the ground as follows: Commencing at a point designated upon Defendants' Exhibit 'B' introduced upon the trial of said cause (reference to which is hereby made and leave asked that the same be incor-

porated in and made a part of the findings of fact in this case) by the letter 'C' from said point in a northerly direction uphill about 600 feet to the northwest corner stake of said claim; thence from said point 'C' north 85 degrees and 44 minutes east 1367.4 feet to a point indicated upon said defendants' Exhibit 'B' by the letter 'B.' Thence from said point 'B' uphill and in a northerly direction 600 feet to a stake which marks the northeast corner stake of said bench claim No. 6 right limit; thence west about 1320 feet to the northwest corner of said claim."

II.

The said Court erred in refusing to make the finding of fact set forth in paragraph 2 of Defendants' proposed findings of fact and conclusions of law, which reads as follows:

"2. That the defendant, A. Zimmerman, on the 12th day of May, 1904, and when the above-described property was open, unappropriated, vacant mineral land of the United States and subject to entry for placer mining purposes, did enter upon, locate and segregate said land from the public domain by marking the boundaries of said location on the ground in such a manner that the same could be readily traced, to wit: By blazing a tree at the point indicated upon said plat by the letter 'C,' which marked the southwest corner of said claim, and by writing upon said tree so blazed substantially that the said defendant

Zimmerman claims 660 feet northerly and uphill from said tree and 1320 feet upstream for placer mining purposes and by further marking the said claim by establishing a substantial stake at the point indicated upon the plat marked Defendants' Exhibit 'B,' upon which he wrote that he claimed 1320 feet downstream and 660 feet uphill, and by further establishing a stake about 600 feet northerly from said point designated upon said plat marked Defendants' Exhibit 'B' by the letter 'B,' and upon which he wrote his name and marked the same as his northeast corner stake, and by establishing a northwest corner stake at a point northerly about 600 feet from the point specified upon said plat by the letter 'C' and by cutting out and blazing the lines thereon; and did then and there so mark the boundaries of said claim upon the ground that the same could be readily traced."

III.

That the said Court erred in refusing to make the finding of fact set forth in paragraph 3 of defendants' proposed findings of fact and conclusions of law, which reads as follows:

"3. That thereafter and within ninety days therefrom the said A. Zimmerman caused a notice of locaiton of said claim to be recorded in the records of the Fairbanks Recording District, District of Alas-

ka, in which said Recording District said claim was and is located, which location notice so recorded contained the name of A. Zimmerman as locator, the date of the location as May the 12th, 1904, and described said claim with reference to adjoining claims, so that the same could be readily identified."

IV.

That the said Court erred in refusing to make the finding of fact set forth in paragraph 4 of defendants' proposed findings of fact and conclusions of law, which reads as follows:

"4. That thereafter and in the month of June, 1904, the said Zimmerman made a discovery of gold within the exterior boundaries of the claim heretofore described, and ever since said time, and from the date of said location has resided upon said claim, working and developing the same, and been in the actual possession thereof."

V.

That said Court erred in refusing to make the finding of fact set forth in paragraph 5 of defendants' proposed findings of fact and conclusions of law, which reads as follows:

"5. That ever since said 12th day of May, 1904, defendant Zimmerman has been, and now is, the owner in fee of said property and every part and parcel thereof."

VI.

That said Court erred in refusing to make the findings of fact set forth in paragraph 6 of defendants' proposed findings of fact and conclusions of law, which reads as follows:

"6. That the plaintiffs herein did not, at the time of the commencement of this action, nor since said time, or at any other time, own or have any estate, interest or claim in or to said property, or to any part or parcel thereof."

VII.

The said Court erred in refusing to find as conclusion of law paragraph 1 of defendants' proposed conclusions of law which reads as follows:

"1. That the defendant Zimmerman is entitled to a judgment ordering and adjudging that he is the owner in fee as to the property set forth in his answer in said cause, and heretofore set forth and known and described as No. 6 first tier, right limit, above Discovery, on Dome Creek, in the Fairbanks Recording District, District of Alaska, and that said defendant is entitled to the sole and exclusive, peaceable and quiet possession of the same."

VIII.

The said Court erred in refusing to find as a conclusion of law as set forth in paragraph 2 of defendants' proposed conclusions of law, which reads as follows:

"2. That the plaintiffs herein have no estate, right, title or interest in and to said property or to any part or portion thereof, and that the defendant Zimmerman is entitled to a judgment that the plaintiffs recover nothing by this action, and that said plaintiffs have no right, title or interest in and to said property, and that the defendant Zimmerman is the owner and entitled to the possession of the whole of the property heretofore described and particularly to the portion of the same which the plaintiffs seek to recover in this action."

IX.

The said Court erred in refusing to find as a conclusion of law as set forth in paragraph 3 of defendant's proposed conclusions of law, which reads as follows:

"3. That a judgment be entered in accordance herewith."

X.

The said Court erred in refusing to make a finding of fact as is set forth in defendants' request for findings of fact, or one of similar import thereto, which is contained in paragraph 1 thereof, which reads as follows:

"1. That on the 12th day of May, 1904, the defendant, A. Zimmerman, a prospector by occupation, while searching for open mineral land of the United

States, for the purpose of locating the same, went upon Creek Claim No. 6 below Discovery, on Dome creek, and saw the lower center stake thereof, and saw written thereon that the locator, Ross, claimed 1320 feet upstream and 330 feet on each side. That there was nothing written upon said stake to indicate that at a point 1320 feet upstream, or at a point 330 feet on each side thereof, the said locator, Ross, had placed stakes or other monuments so as to mark the boundaries of said claim."

XI.

The said Court erred in refusing to make a finding of fact as set forth in paragraph 2 of defendants' request for findings, or one of similar import thereto, which reads as follows:

"2. That the said defendants, Zimmerman, after examining said lower center stake of said claim No. 6 below Discovery on Dome Creek, went to a point north one degree and two minutes east of said lower center stake 345.8 feet, and made an examination of said place, and did not see, nor was he able to find, any stake, or other monument which marked the northwest corner of said claim No. 6; but at said point he saw a small stake which he believed to be the northwest corner stake of said No. 6 below Discovery on Dome Creek, and so believing and at said point there being nothing to indicate where plaintiffs' claimed their northwest corner stake of said

No. 6 was, established a stake being the southwest corner stake of bench claim No. 6 above Discovery on Dome Creek, right limit, and then proceeded and did mark the boundaries of his said claim as is set forth in the defendants' proposed findings of fact. That the country in and about said claim and in the vicinity thereof is covered with brush and timber, and the view from one corner of said claim to another so obstructed by intervening brush and timber, and at said time, to wit, on the 12th day of May, 1904, it was impossible to determine the boundaries of the claim upon said Dome Creek unless the stakes or posted notices indicated the extent the locator claimed, or unless the lines of said claim were blazed and cut so that they could be readily traced."

XII.

That said Court erred in refusing to make a finding of fact as is set forth in paragraph 3 of defendants' request for findings, or one of similar import thereto, which reads as follows:

"3. That the location as made by the said Ross in September of 1902 contained within its limits 21.641 acres as will more fully appear from the map or plat offered in evidence on the trial of this cause marked Defendants' Exhibit 'A,' which is hereby referred to for the purpose of more particularly showing the said excess."

XIII.

That said Court erred in refusing to make a finding of fact as is set forth in paragraph 4 of defendants' request for findings, or one of similar import thereto, which reads as follows:

"4. That the said northwest corner stake of No. 6 above Discovery on Dome Creek as claimed by the plaintiffs was about 480 feet in a northerly direction from the lower center stake upon which the said Ross had caused a notice to be written that he claimed 1320 feet up stream and 330 feet wide."

XIV.

That said Court erred in refusing to make a finding of fact as contained in paragraph 5 of defendants' request for findings, or one of similar import thereof, which reads as follows:

"5. That the plaintiffs herein failed and neglected to file with the recorder of the Fairbanks Recording District within ninety days from the discovery of said claim a notice of location which contained the name of the locator, the date of the location and such a description of the claim with reference to natural objects and permanent monuments so that the same could be readily identified, but on the contrary said locator caused a pretended notice of location to be filed which fails to describe the property with reference to some natural objects or permanent monu-

ment so that the same could be readily traced and which said notice of location claimed 1320 feet down stream from the upper center stake and 660 feet in width, as will more fully appear from said notice of location, a copy of which is herewith set forth, to wit:

'LOCATION NOTICE.

Notice is hereby given that I, the undersigned, has located twenty acres of placer mining ground on Dome Creek in the Circle Recording District, District of Alaska, as follows: Commencing at a stake bearing location notice and adjoining No. 7 above Discovery; thence down stream a distance of 1320 feet to a stake, thence 660 feet in width to said claim. This claim to be known as No. 6 above Discovery on Dome Creek.

Located this the 18th day of September, 1902.

JOHN C. ROSS,
By his Attorney,
JAMES FUNCHION.

Witnesses:
HERBERT E. WILLSON.

Filed for record October 29th, 1902 at 1:30 P. M.
CHARLES ETHELBERT CLAYPOOL,
Commissioner and Ex-officio Recorder.
By J. Todd Cowles,
Deputy.''

XV.

The Court erred in overruling the defendants' objections to findings of fact No. 1 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

"1. That the plaintiffs have established that the placer mining claim in controversy described in their amended complaint as Creek placer mining claim Number Six (6) above Discovery on Dome Creek, Territory of Alaska, Third Division, was duly staked for one John C. Ross by James Funchion, his duly appointed attorney in fact, on or about September 18, 1902; the same being prior to said date vacant, unoccupied mineral ground of the United States, and that on said date and thereafter before defendants entered thereon the boundaries thereof were clearly indicated by stakes thereof so that the same could be readily traced upon the ground, and that the said stakes and monuments were placed and established as follows: That said James Funchion placed his initial stake at the upper end of said claim, approximately in the center thereof, and thereupon had written a notice of location claiming twenty acres in extent, and in size six hundred and sixty (660) feet in width by thirteen hundred and twenty (1320) feet in length. That thereafter said Funchion established his southeast corner stake, being the upper left limit corner stake, at a distance of about three

hundred and one and eight-tenths (301.8) feet from his initial stake, and marked said stake as the 'left limit upper corner stake' of said claim, and thereafter said Funchion established his northeast corner stake, being the right limit upper corner stake, at a distance of about two hundred and eighty-eight and nine-tenths (288.9) feet from his initial stake and marked the same as his 'right limit upper corner stake' of said claim; that thereafter said Funchion established his northwest corner stake, being the right limit lower corner stake, by adopting the northeast right limit upper corner stake of creek placer mining claim number five (5) adjoining said claim number six, and marked the said stake as his right limit lower corner stake, the same being at about the distance of thirteen hundred and fifteen and four-tenths (1315.4) feet from his northeast upper corner stake, and that thereafter said Funchion established his lower center stake by adopting the upper center stake of said creek claim number five (5) above Discovery and next adjoining, at a distance of about three hundred and seventy-seven (377) feet from said northwest corner stake, and faced and marked said stake as his lower center stake, and that thereafter said James Funchion adopted for his southwest corner stake the southeast left limit corner stake of creek claim number five (5) next adjoining at a distance of about three

hundred and sixty-four and four-tenths (364.4) feet from his lower center stake, and faced and marked said stake as his lower left limit corner stake, and that the distance between the southwest corner stake and the southeast corner stake of said claim is about thirteen hundred and twenty-five and one-tenth (1325.1) feet. That plaintiffs acquired title from the said John C. Ross by conveyance, and that plaintiff and their grantor ever since location thereof have been entitled to the possession of said claim, and have made due discovery of gold thereon in such quantities as to justify a prudent man in further expending his time and money in developing and working said claim, and ever since the year of location have expended more than one hundred ($100.00) dollars each year in working and developing the claim as assessment work thereon, and had on the 29th day of October, 1902, duly filed their location notice."

XVI.

The Court erred in overruling the defendant's objection to finding of fact No. 2 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

"2. That after the due location of said claim, and after the plaintiffs had acquired title thereto, and while they were entitled to the possession of the same, and were exercising dominion and control

thereof, the defendants herein, by themselves, their servants, agents and employees, entered upon the same at a point near the northwest corner thereof, and began to mine and extract gold therefrom and were so doing at the date of the institution of this action."

XVII.

The Court erred in overruling the defendants' objection to finding of fact No. 3 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

"3. That when the said claim was originally located, it was staked and located in excess of twenty (20) acres, to wit, in the full area of about twenty-one and seven-tenths (21.7) acres, but that said excess was claimed unintentionally and by mistake, and that plaintiffs have occupied and possessed the same in good faith in the belief that the area thereof did not exceed twenty (20) acres; and that said excess was not known and was not ascertained by either plaintiffs or defendants until after the institution of this action."

XVIII.

The Court erred in overruling the defendant's objection to finding of fact No. 4 of the findings of fact signed and filed in this case, and in making the same, which reads as follows:

"4. That the plaintiffs, before commencing this action, to wit: On or about September 1, 1906, caused a survey of said claim to be made by one R. A. Jackson, a competent surveyor, who after such survey and measurement ascertained the area thereof to be about seventeen and one-half (17.5) acres."

XIX.

The Court erred in overruling the defendant's objection to finding of fact No. 5 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

"5. That after the institution of this action, both plaintiffs and defendants caused surveys of the premises included within the boundaries of said claim as originally staked and marked to be made by competent surveyors, who after survey and measurement ascertained that the claim as originally staked and marked contained more than twenty (20) acres, to wit, about twenty-one and seven-tenths (21.7) acres, and such survey was received and accepted by the parties hereto as correct."

XX.

That the Court erred in overruling the defendants' objection to finding of fact No. 6 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

"6. That the said plaintiffs, when they had ascertained to their satisfaction that said claim was in ex-

cess, forthwith drew in their lines so as to disclaim such excess at a point two hundred and thirty-three and eight-tenths (233.8) feet south of the lower end center stake, as originally staked and located, and erected at said point a substantial monument and placed thereon their amended notice of location signed with their names, marking such post or monument as the 'New southwest corner stake' of said claim, and claiming therefrom to the southeast corner stake as originally located a distance of about thirteen hundred and eleven (1311) feet, and only filed a notice of said amended location, and notified the defendants herein of their action. But that said error and miscalculation in originally staking said claim was made and committed by said James Funchion without fraud but on the contrary in good faith and in the belief that the claim did not exceed twenty (20) acres in area."

XXI.

The Court erred in overruling the defendants' objection to finding of fact No. 7 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

"7. That plaintiffs' amended location claims not to exceed twenty (20) acres, and that after duly recording the same, plaintiffs filed herein, by permission of the Court, an amended complaint claiming

the area set out and described in their amended location notice."

XXII.

The Court erred in overruling defendants' objection to conclusion of law No. 1 of the conclusion of law signed and filed in this cause, and in making the same, which said conclusion of law reads as follows:

"1. That the plaintiffs, James Funchion and Amy Sale are entitled to a judgment ordering and adjudging that they are the owners in fee, as against every person whomsoever except the United States of America, as to the property set forth and described in their amended complaint in said cause, and known as creek placer mining claim number six (6) above Discovery, Fairbanks Recording District, Territory of Alaska, and that said plaintiffs are entitled to the sole and exclusive peaceable and quiet possession of the same."

XXIII.

The Court erred in overruling defendants' objection to conclusions of law No. 2 of the conclusions of law signed and filed in this cause, and the making of the same, which said conclusion of law reads as follows:

"2. That the defendants at the time of their entry on said premises as described in plaintiffs' amended complaint had no right, title, interest or estate in said described premises, or in any part or

portion thereof, and that their entry was unlawful and without color of title, and that they have since said time acquired no right in and to said property."

XXIV.

The Court erred in overruling defendants' objection to conclusion of law No. 3 of the conclusions of law signed and filed in this cause, and in making the same, which reads as follows:

"3. That plaintiffs have judgment in accordance herewith."

XXV.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph 1 of defendants' request for conclusions based upon the findings of fact made by the court herein, which said proposed conclusion of law is as follows:

"1. That the defendant, Zimmerman, is now and ever since the 12th day of May, 1904, has been the owner in fee, in possession, and entitled to the sole and exclusive possession of that certain placer mining claim known as bench claim No. 6 above Discovery on the right limit and first tier of benches on Dome Creek in the Fairbanks Recording District, Territory of Alaska, which said claim includes within its boundaries the property in controversy between the plaintiffs and the defendants herein, which has been designated as the 'overlap,' and that the

plaintiffs have no estate, right, title or interest in and to the same."

XXVI.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph 2 of defendants' request for conclusions based upon the findings of fact made by the court herein, which is as follows, to wit:

"2. That said creek placer claim No. 6 above Discovery on Dome Creek was and is void as to the excess over twenty acres, and as said excess was claimed by the defendant, Zimmerman, on May 12th, 1904, he is now and ever since said time has been the owner in fee of the same and entitled to the sole and exclusive possession thereof."

XXVII.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph 3 of defendants' request for conclusions based upon the findings of fact made by the court herein, which is as follows, to wit:

"3. That the defendant, Zimmerman, is entitled to recover his costs and disbursements herein, and that a judgment should be entered in accordance with these findings and conclusions."

XXVIII.

The Court erred in not making and rendering a judgment in favor of the defendants and against the

plaintiffs to the effect that the defendants are the owners in fee as to all persons save and except the United States in and to the property known and described as No. 6 Above Discovery on the right limit of Dome Creek, as staked and located by Zimmerman upon the 12th day of January, 1904, and which includes within its limits the property in controversy in this action.

XXIX.

The Court erred in not making and rendering a judgment in favor of the defendants and against the plaintiffs.

XXX.

The Court erred in rendering and entering a judgment in favor of the plaintiffs and against the defendants to the effect that the claim of the defendants in and to the property in this action described is groundless and without right.

XXXI.

The Court erred in ordering and adjudging that the plaintiffs recover their costs and disbursements herein.

XXXII.

The Court erred in refusing to make and file the findings of fact and conclusions of law proposed by the defendants, and in signing and filing the proposed findings of fact and conclusions of law submitted by the plaintiffs.

XXXIII.

The Court erred in overruling the defendant's objections to the findings of fact and conclusions of law signed by the court in this cause.

XXIV.

The Court erred in allowing the plaintiffs, over the objections of the defendants, to introduce in evidence an amended notice and certificate of location, the same being marked Plaintiffs' Exhibit 5, which is in words and figures as follows:

Plaintiffs' Exhibit 5.

NOTICE AND AMENDED CERTIFICATE OF PLACER LOCATION.

We, James Funchion and Amy Sale, citizens of the United States, hereby certify that we are the owners by purchase from the original locators of that certain placer mining claim situated in the Fairbanks Recording District, Territory of Alaska, Third Division, and further described as being placer mining creek claim number six (6) Above Discovery on Dome Creek, in the recording district aforesaid. That on the 18th day of September, 1902, John C. Ross, the original locator, by his attorney, James Funchion, duly located the said placer mining claim and on the 29th day of October, 1902, caused a record of said location to be duly entered and filed in the

Circle recording district, and that the said location was in the words and figures following, to wit:

Notice is hereby given that I, the undersigned, has located 20 acres of placer mining ground on Dome Creek in the Circle Recording District, District of Alaska, described as follows: Commencing at a stake bearing location notice and joining No. 7 Above Discovery, thence down stream a distance of 1320 feet to a stake, thence 660 feet in width of said claim; "this claim to be known as No. 6 Above Discovery on Dome Creek.

Located this 18th day of Sept., 1902.

JOHN C. ROSS,

By his Attorney,

JAMES FUNCHION.

Witness:

HERBERT E. WILLSON.

Filed for record Oct. 29, 1902, at 1:30 P. M.

CHAS. ETHELBERT CLAYPOOL,

Commissioner and ex-Officio Recorder.

By J. T. Cowles,

Deputy.

That for the purpose of reducing the area of said claim and for the further purpose of curing any defects and errors in the said original certificate, and any failure to comply with the requirements of law in that respect and with the further purpose of better describing the lines and surface boundaries of the

said location as amended, we, the owners, now make and file in the office of the proper recording district at Fairbanks, Alaska, this, our amended certificate of location of the said claim, and that the description of said claim will be henceforth as follows, to wit:

Creek placer mining claim No. 6 Above Discovery on Dome creek, the boundaries thereto being substantially as follows: Starting from the initial stake at the upper end of said claim, approximately in the center thereof, thence northerly a distance of 269 feet to the northeast corner stake, and from said corner stake thence westerly for a distance of 1313 feet to a stake marked 'Lower right limit northwest corner stake' between creek claims #5 and #6; thence in a southerly direction slightly to the west for a distance of 477.1 feet to another stake marked 'west and center stake'; thence in a southerly direction for a distance of 233.8 feet to a stake marked 'Lower southwest corner stake'; thence in an easterly direction for a distance of 1311 feet to a stake marked 'southeast corner stake,' thence in a northerly direction for a distance of 301.5 feet to the point of beginning.

That we have caused a permanent monument, being a substantial post, to be erected on the lower boundary down stream between the west end center stake and the former southwest corner stake 233.8 feet from the said west end and center stake and 129.3

feet from the former southwest corner stake, which said stake will henceforth be our permanent southwest corner stake and is marked 'new southwest corner stake of creek claim No. 6 Below Discovery, amended location,' and signed with our names.

That said amended location as above described embraces the original discovery as well as all development work which we have done or which has been performed upon or for the benefit of said original claim, and we thereby claim that this amended certificate of location relates back to the date of the original location and that it is entitled to the benefit of the original discovery as well as all work done or improvements made by our grantors and ourselves within the limits of said amended location, or for the benefit of the original locator.

JAMES FUNCHION.
AMY SALE.

[Endorsements]: Indexed: No. 16,604. Notice and Amended Certificate of Placer Location Creek Claim No. 6 Above on Dome. James Funchion and Amy Sale. District of Alaska, Third Judicial Division, ss. Filed for Record at Request of C. E. Claypool on the 3d day of Nov., 1906, at 40 min. past 10 A. M., and Recorded in Vol. 7 of Locs., page 626. Fairbanks Recording District. G. B. Erwin, Recorder, by Henry T. Ray, Deputy.

No. 572. In the District Court, Territory of Alaska, Third Division. Funchion vs. Zimmerman. Plaintiffs' Exhibit No. 5. Filed in the District Court, Territory of Alaska, Third Division. Nov. 21, 1906. E. J. Stier, Clerk. By E. A. Henderson, Deputy."

XXXV.

The Court erred after all the testimony on behalf of the plaintiffs and defendants was closed and said cause submitted to the Court for decision in ordering and directing that Herbert E. Willson go to the premises in controversy and make an inspection as to the condition of the stakes on said ground and report the same to said Court.

XXXVI.

The Court erred in admitting in evidence the said report of said Ralph Hatton, Herbert E. Willson and in considering the same, and in rendering the decision in this cause upon the said testimony of said witnesses, and not upon the testimony of all of the witnesses upon said trial.

XXXVII.

The Court erred in not rendering a judgment in favor of the defendant, Zimmerman, to the effect that he is the owner and entitled to all that portion of said creek claim No. 6 as original staked, which is in excess of twenty acres.

Wherefore the defendants pray that the judgment of this Court be vacated and reversed, and that judgment be entered in favor of the defendants, and that they have such other and further relief as in accordance with the law they are entitled to receive.

McGINN & SULLIVAN,
Attorneys for Defendants.

Service of the foregoing assignments of error is hereby acknowledged at Fairbanks, Alaska, this 16th day of February, 1907.

CLAYPOOL, KELLUM & COWLES,
Attorneys for Plaintiffs.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale vs. A. Zimmerman, Ed. Wurzbacher, Andrew Jack and Roy Fairbanks, Defendants. Assignment of Errors. Filed in the District Court, Territory of Alaska, Third Division. February 16th. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Petition for Writ of Error.

A. Zimmerman, Ed Wurzbacher, Roy Fairbanks and Andrew Jack, defendants in the above-entitled cause feeling themselves aggrieved by the verdict of

the jury and the judgment made and entered in the above-entitled court and cause on the 23d day of January, 1907, come now by Messrs. McGinn & Sullivan, their attorneys, and petition said court for an order allowing said defendants to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and also, that an order be made fixing the amount of security which the defendants shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be sustained and stayed until the determination of such writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioners will ever pray.

McGINN & SULLIVAN,
Attorneys for Defendants.

Service of the foregoing petition for writ of error is hereby admitted at Fairbanks, Alaska, this the 16th day of February, 1907.

CLAYPOOL, KELLUM & COWLES,
Attorneys for Plaintiffs.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale vs. A. Zimmerman, Ed. Wurz-

bacher, Andrew Jack and Roy Fairbanks, Defendants. Petition for Writ of Error. Filed in the District Court, Territory of Alaska, Third Division. February 16th, 1907. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

At a stated term, to wit, the special July term of the District Court of the Territory of Alaska, Third Division, held at the courtroom in Fairbanks, Alaska, on the 16th day of February, 1907. Present: The Honorable JAMES WICKERSHAM, District Judge.

[Title of Court and Cause.]

Order Allowing Writ of Error, etc.

On motion of Messrs. McGinn & Sullivan, attorneys for the defendants, and the filing of a petition for a writ of error, and an assignment of errors,—

It is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at $2,000, the same to act as a supersedeas bond, and also a bond for costs and damages on said writ of error.

JAMES WICKERSHAM,
District Judge.

Entered in Court Journal, No. 7, page 246.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale, vs. A. Zimmerman, Ed. Wurzbacher, Andrew Jack and Roy Fairbanks, Defendants. Order Allowing Writ of Error. Filed in the District Court, Territory of Alaska, Third Division. February 16th, 1907. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Writ of Error (Original).

United States of America,—ss.

The President of the United States of America, to the Honorable JAMES WICKERSHAM, Judge of the District Court for the Territory of Alaska, Third Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the Third Division of the Territory of Alaska, before you, between James Funchion and Amy Sale, plaintiffs, against A. Zimmerman, Ed. Wurzbacher, Roy Fairbanks, and Andrew Jack, defendants, a manifest error has happened to the great prejudice and damage of the

said defendants, A. Zimmerman, Ed. Wurzbacher, Roy Fairbanks and Andrew Jack, as is said and appears by the petition herein.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ so as to have the same at the said place in said circuit on the 18th day of March, 1907, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States this the 16th day of February, 1907.

Attest my hand and seal of the United States Court for the District of Alaska, Third Division, at the

clerk's office at Fairbanks, Alaska, on this the 16th day of February, 1907.

EDWARD J. STIER,

Clerk of the District Court for the Third Division of the District of Alaska.

By E. A. Henderson,

Deputy.

Allowed this 16th day of February, 1907.

[Seal] JAMES WICKERSHAM,

Judge for the District Court for the Third Division of the District of Alaska.

Service of the within and foregoing writ of error by receipt of a copy thereof is hereby admitted at Fairbanks, Alaska, this 16th day of February, 1907.

CLAYPOOL, KELLUM & COWLES,

Attorneys for Plaintiffs.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale vs. A. Zimmerman, Ed. Wurzbacher, Andrew Jack and Roy Fairbanks, Defendants. Original Writ of Error. Filed in the District Court, Territory of Alaska, Third Division. February 16th. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Bond on Writ of Error.

Know all men by these presents, that we, A. Zimmerman and A. Zimmerman, as principals, and H. Cook and J. C. Ridenour, as surety, are held and firmly bound unto James Funchion and Amy Sale, plaintiffs above named in the sum of two thousand dollars, to be paid to the said James Funchion and Amy Sale, their executors, administrators or assigns to which payment well and truly to be made, we bind ourselves and each of our executors, administrators and assigns jointly and severally, and firmly by these presents.

Sealed with our seals and dated this the 16th day of February, 1907.

Whereas, the above-named defendants, A. Zimmerman, Ed. Wurzbacher, Roy Fairbanks and Andrew Jack, have sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States for the Third Division of the Territory of Alaska.

Now, therefore, the condition of this obligation is such that if the above-named defendants shall prosecute said writ to effect and answer all costs and damages if they shall fail to make good their plea, then

this obligation shall be null and void; otherwise to remain in full force and virtue.

A. ZIMMERMAN. [Seal]
H. COOK, [Seal]
Surety.
J. C. RIDENOUR, [Seal]
Surety.

United States of America,
Territory of Alaska,—ss.

H. Cook and J. C. Ridenour, whose names are subscribed to the above and foregoing undertaking as sureties, being first duly sworn, each for himself, doth depose and say; that he is a resident of the town of Fairbanks, Territory of Alaska, that he is not a counselor at law, marshal, clerk of any court, or other officer of any court; that he is worth the sum specified in the foregoing instrument, to wit, the sum of $2,000.00 exclusive of property exempt from execution, over and above all his just debts and liabiilties.

H. COOK.
J. C. RIDENOUR.

Subscribed and sworn to before me the 16th day of February, 1907.

[Notary Seal] JOHN L. McGINN,
Notary Public for Alaska.

Sufficiency of surety on the foregoing bond approved this 16th day of February, 1907.

JAMES WICKERSHAM,
District Judge.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale vs. A. Zimmerman, Ed. Wurzbacher, Andrew Jack and Roy Fairbanks, Defendants. Bond on Writ of Error and Order Allowing Same. Filed in the District Court, Territory of Alaska, Third Division. February 16, 1907. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Citation on Writ of Error (Original).

United States of America.—ss.

The President of the United States to James Funchion and Amy Sale, and to Claypool, Kellum & Cowles and F. de Journel, their Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ pursuant to a writ of error filed in the clerk's office of the District Court

for the Territory of Alaska, Third Division, wherein A. Zimmerman, Ed. Wurzbacher, Roy Fairbanks, and Andrew Jack, are plaintiffs in error and you are the defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 12th day of February, 1907.

[Seal] JAMES WICKERSHAM,
District Judge Presiding in the Third Division of the Territory of Alaska.

Attest: EDWARD J. STIER,
Clerk.
By E. A. Henderson,
Deputy.

Due service of the above citation is hereby acknowledged by receipt of copy thereof, this the 16th day of Feb., 1907.

CLAYPOOL, KELLUM & COWLES,
Attorneys for Plaintiffs.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale vs. A. Zimmerman, Ed. Wurzbacher, Andrew Jack and Roy Fairbanks, Defendants. Citation. Filed in the District Court, Terri-

tory of Alaska, Third Division. February 16, 1907. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Order Extending Time to Docket Cause.

On this 16th day of February, 1907, the above-entitled cause came on to be heard before the Judge in the above-entitled court, upon the stipulation of the parties herein for an order extending the return day, and the parties appearing by their respective attorneys, and it appearing to the Court that it is necessary owing to the great distance from Fairbanks to San Francisco, California, and the slow and uncertain communication between said points, that an order extending the time in which to docket said cause and to file the record therein by the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, should be extended until the first day of April, 1907, and the parties hereto having stipulated to the same.

Now, then, the Court being fully advised in the premises and deeming that good cause exists therefor,

It is ordered that the time within which said appellant shall docket said cause on appeal be, and the

same is hereby, enlarged to extend to and include the first day of April, 1907.

JAMES WICKERSHAM,
District Judge.

Entered in Court Journal No. 7, page 246.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale, vs. A. Zimmerman, Ed. Wurzbacher, Andrew Jack and Roy Fairbanks, Defendants. Order Extending Time for Docketing Writ of Error. Filed in the District Court, Territory of Alaska, Third Division. February 16th, 1907. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Stipulation Extending Time to Docket Writ of Error.

It is hereby stipulated and agreed by and between the parties hereto that the time for docketing the writ of error in this action be, and the same is hereby, extended to include the first day of April, 1907.

CLAYPOOL, KELLUM & COWLES,
Attorneys for Plaintiffs.
McGINN & SULLIVAN,
Attorneys for Defendants

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Fun-

chion and Amy Sale, Plaintiffs, vs. A. Zimmerman, Ed. Wurzbacher, Roy Fairbanks, and Andrew Jack, Defendants. Stipulation Extending Time to Docket Writ of Error. Filed in the District Court, Territory of Alaska, Third Division. February 16, 1907. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Stipulation Relative to Printing of Record.

It is hereby stipulated and agreed that in the printing of the record herein for the consideration of the court on appeal, that the title of the court and cause in full on all papers shall be omitted excepting the first page, and inserted in place and stead therein "Title of Court and Cause."

Done this the 16th day of February, 1907.

CLAYPOOL, KELLUM & COWLES,
Attorneys for Plaintiffs.
McGINN & SULLIVAN,
Attorneys for Defendants.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division, James Funchion and Amy Sale, Plaintiffs, vs. A. Zimmerman, Ed. Wurzbacher, Roy Fairbanks, and Andrew Jack, Defendants. Stipulation as to Printing of Title and Cause. Filed in the District Court, Territory of

Alaska, Third Division. February 16th, 1907. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the writ of error heretofore perfected to said court and include in said transcript the following pleadings, proceedings and papers on file, to wit:

Complaint, amended complaint, answer, reply, findings of fact and conclusions of law, judgment, bill of exceptions, order settling bill of exceptions, assignment of errors, petition for writ, order allowing writ upon appeal, original writ of error, citation and admission thereon, order extending return day, stipulation for order extending return day, stipulation for printing transcript, praecipe for transcript, order of supersedeas and stipulation as to make-up of record.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit and on file in the office of the clerk of the

said Circuit Court of Appeals at San Francisco, California, before April 15th, 1907.

McGINN & SULLIVAN,
Attorneys for Appellants.

[Endorsements]: No. 572. In the District Court, Territory of Alaska, Third Division. James Funchion and Amy Sale, Plaintiffs, vs. A. Zimmerman, Ed. Wurzbacher, Roy Fairbanks, and Andrew Jack, Defendants. Praecipe for Transcript. Filed in the District Court, Territory of Alaska, Third Division. February 19th, 1907. E. J. Stier, Clerk. By E. A. Henderson, Deputy.

[Endorsed]: No. 1455. United States Circuit Court of Appeals for the Ninth Circuit. A. Zimmerman, Ed. Wurzbacher, Roy Fairbanks and Andrew Jack, Plaintiffs in Error, vs. James Funchion and Amy Sale, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Territory of Alaska, Third Division.

Filed April 13, 1907.

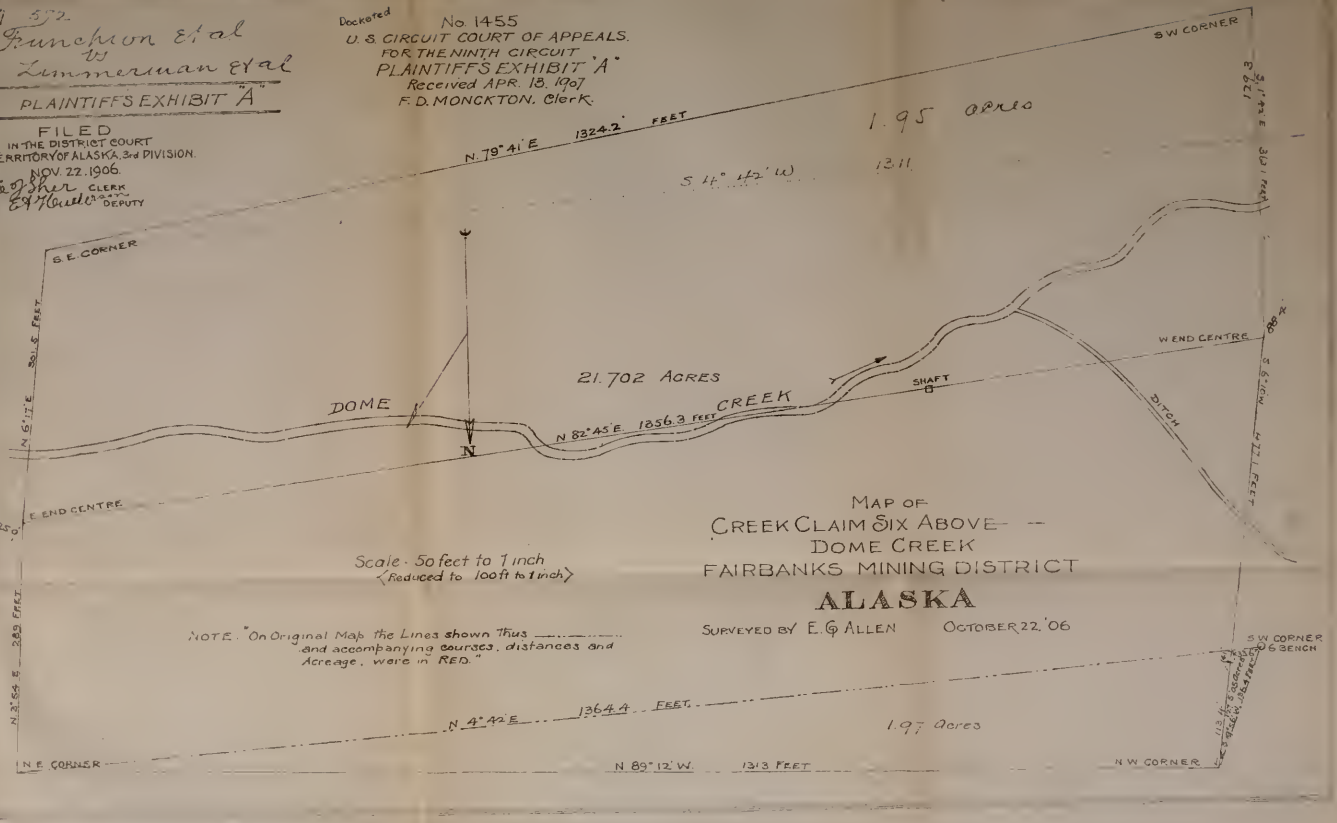
F. D. MONCKTON,
Clerk.

A 572.
Funchion et al
v
Zimmerman et al

PLAINTIFFS EXHIBIT "A"

FILED
IN THE DISTRICT COURT
TERRITORY OF ALASKA, 3rd DIVISION.
NOV. 22. 1906.
E. J. Fisher CLERK
By E. J. Fisher DEPUTY

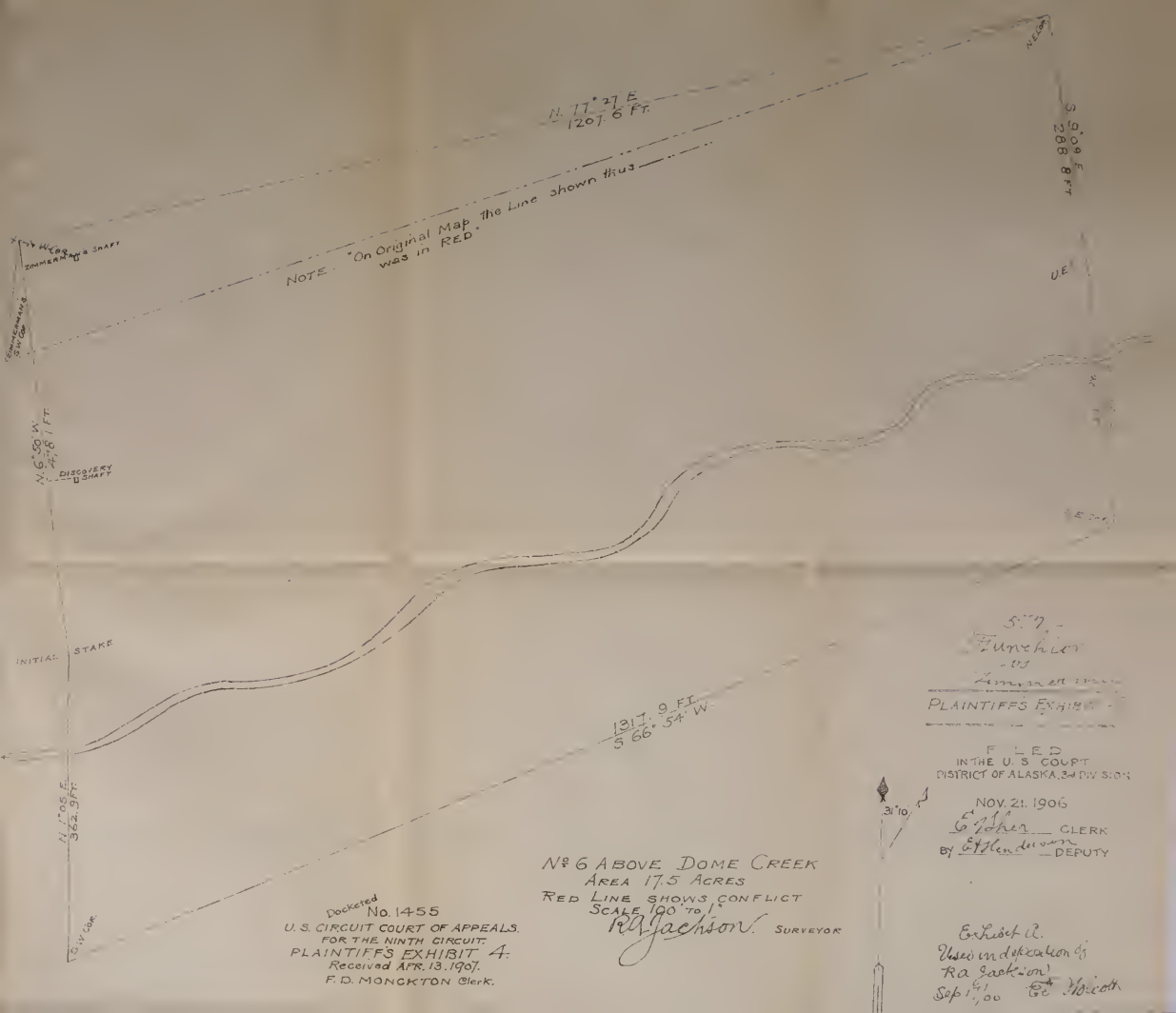
Docketed
No. 1455
U. S. CIRCUIT COURT OF APPEALS.
FOR THE NINTH CIRCUIT
PLAINTIFFS EXHIBIT "A"
Received APR. 18. 1907
F. D. MONCKTON, Clerk.



MAP OF
CREEK CLAIM SIX ABOVE -- --
DOME CREEK
FAIRBANKS MINING DISTRICT
ALASKA
SURVEYED BY E. G. ALLEN OCTOBER 22. '06

Scale - 50 feet to 1 inch
(Reduced to 100 ft to 1 inch)

NOTE. "On Original Map the Lines shown Thus ——— and accompanying courses, distances and Acreage, were in RED."


N. 11° 27 E.
1207. 6 FT.
NOTE "On Original Map the Line shown thus ——— was in RED"
S. 0° 09 E.
288. 8 FT.
N. 6° 30 W.
947. 6 FT.
DISCOVERY
SHAFT
INITIAL STAKE
1317. 9 FT.
S. 66° 54' W.
N. 1° 05 E.
362. 9 FT.
S. W. COR.
No 6 ABOVE DOME CREEK
AREA 17.5 ACRES
RED LINE SHOWS CONFLICT
SCALE 100 TO 1"
R.D. Jackson SURVEYOR
Docketed
No. 1455
U.S. CIRCUIT COURT OF APPEALS.
FOR THE NINTH CIRCUIT.
PLAINTIFFS EXHIBIT 4.
Received APR. 13. 1907.
F.D. MONCKTON Clerk.
PLAINTIFFS EXHIBIT
FILED
IN THE U.S. COURT
DISTRICT OF ALASKA, 3rd DIV. SION
NOV. 21. 1906
CLERK
DEPUTY
Exhibit A.
Used in explanation of
R.A. Jackson
Sept 4, 00

No 572

Flinchon et al
vs
Zimmerman et al

DEFT'S EXHIBIT '8'

FILED
IN THE DISTRICT COURT
TERRITORY OF ALASKA, 3rd DIVISION
NOV. 22. 1906.
G. H. Fisher CLERK
BY B. Henderson DEPUTY

Docketed No 1455
U.S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
DEFENDANT'S EXHIBIT 'B'
Received APR 13 1907.
F. D. MONCKTON Clerk

PLAN

--OF--

CLAIM No6 ABOVE DISCOVERY

--ON--

DOME CREEK

FAIRBANKS MINING DISTRICT, ALASKA.

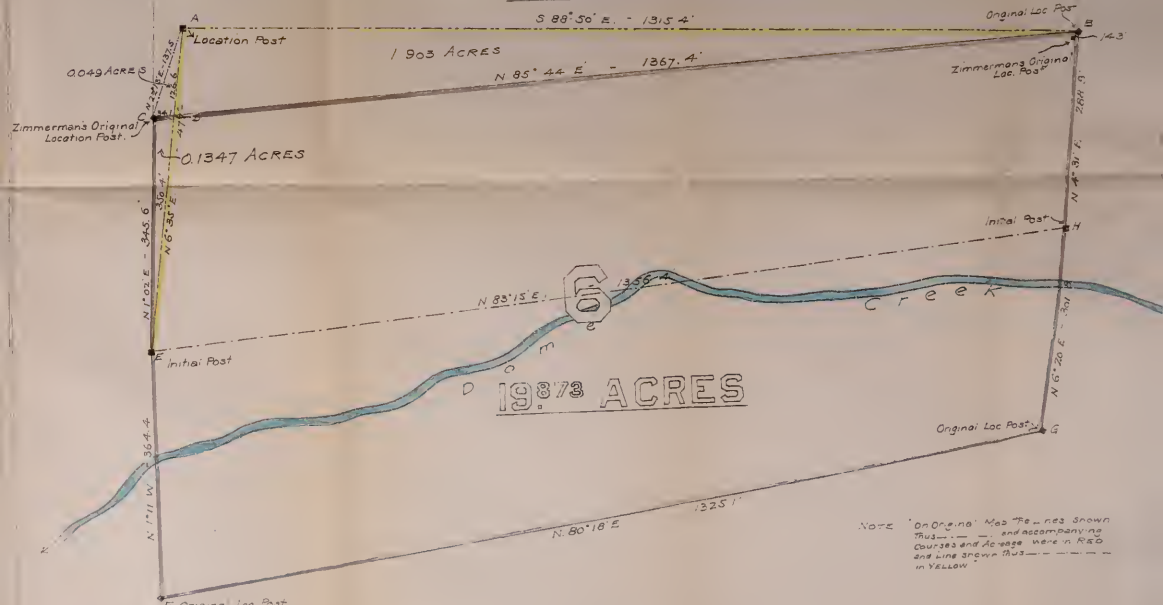
BOUNDARIES AS CLAIMED BY ZIMMERMAN

SURVEY BY L. A. Pope, SEPT. 30TH 1906
CIVIL & MINING ENGR.

SCALE 100 FEET TO THE INCH.

ZIMMERMAN'S CLAIM

1ST TIER BENCH : RIGHT LIMIT.



NOTE 'On Orginal' Mag "Bearings Shown Thus—.—.—.— and accompanying Courses and Acreage were in R&O and Line shown Thus— — — — — in YELLOW'

C.E. No. 1-B, AREA 19.873 ACRES, BOUNDARIES OF 6 AS CLAIMED BY ZIMMERMAN
4-C.E. No. 3-B, " 2.641 " " " " " " FLINCHON ET AL

Exhibit "C."

In the District Court in and for the Territory of Alaska, Third Division.

JAMES FUNCHION and AMY SALE,
Plaintiffs,

vs.

A. ZIMMERMAN, ED. WURZBACHER, ANDREW JACK and ROY FAIRBANKS,
Defendants.

Notice.

To the Above-named Defendants, and Messrs. McGinn & Sullivan, their Attorneys:

You are hereby notified that the plaintiffs in the above-entitled cause of action, the owners of creek placer mining claim #6 Above Discovery on Dome creek, Alaska, having ascertained to their own satisfaction by surveys and measurement that said claim is in area in excess of the amount allowed by law and as now staked and bounded contains about 21,702 acres, that said plaintiffs on Friday, November 2d, 1906, at the hour of 12 o'clock M., will amend the location of said claim so as to make the same conform to the law, by placing on said ground, on the western boundaries thereof, at a point about 233.8 feet in a southerly direction from the "West end

center stake" thereof, a new "Lower southwest corner stake" and adopt the same as the new "Lower southwest corner stake" of said amended location and place thereon a notice of said amended location, said notice being in words and figures as follows, to wit:

"NOTICE OF AMENDED LOCATION.

Notice is hereby given that we, the undersigned, James Funchion and Amy Sale, hereby adopt this post as the 'New Southwest corner stake' of creek claim #6 Above Discovery, on Dome creek, the boundaries to said claim being hereafter substantially as follows: Starting from the initial stake at the upper end of said claim, approximately in the center thereof, thence northerly a distance of 269 feet to the northeast corner stake, and from said corner stake, thence westerly for a distance of 1,313 feet to a stake marked 'Lower right limit northwest corner stake' between creek claims #5 and #6, thence in a southerly direction slightly to the west for a distance of 477.1 feet to another stake marked 'West end center stake'; thence in a southerly direction for a distance of 233.8 feet to a stake marked 'Lower southwest corner stake' being the stake first mentioned above herein as 'New southwest corner stake'; thence in an easterly direction for a distance of 1,311 feet to a stake marked the 'southeast corner

stake,' being the stake first mentioned above herein as 'New southwest corner stake'; thence in an easterly direction for a distance of 1,311 feet to a stake marked the 'southeast corner stake'; thence in a northerly direction for a distance of 301.5 feet to the place of beginning.

Dated October 30, 1906.

JAMES FUNCHION,
AMY SALE,
Owners and Amended Locators."

And you are further notified that this notice is given for the purpose of enabling said defendants herein to locate and appropriate the said excessive area herein disclaimed by plaintiffs, amounting to about 1.8 acres.

CLAYPOOL, KELLUM & COWLES and
F. de JOURNEL,
Plaintiffs' Attorneys.

Service of copy of the within and foregoing notice is hereby admitted this 1st day of November, 1906.

McGINN & SULLIVAN,
Defendants' Attorneys.

[Endorsed]: No. 572. In the District Court, for the Territory of Alaska, Third Division. James Funchion et al., Plaintiffs, vs. A. Zimmerman et al., Defendants. Notice. Exhibit "C." Filed in the District Court, Territory of Alaska, 3d Division.

Nov. 20, 1906. E. J. Stier, Clerk. By ————, Deputy. Claypool, Kellum & Cowles & F. de Journel, Attys. for Pltffs., Fairbanks, Alaska.

No. 1455. U. S. Circuit Court of Appeals for the Ninth Circuit. Exhibit "C." Received Apr. 13, 1907. F. D. Monckton, Clerk.

No. 1455

2

IN THE

United States Circuit Court of Appeals

IN AND

FOR THE NINTH CIRCUIT.

A. ZIMMERMAN, ED. WURZBACHER, ROY FAIRBANKS and ANDREW JACK,

Plaintiffs in Error,

vs.

JAMES FUNCHION and AMY SALE,

Defendants In Error.

BRIEF FOR APPELLANTS IN ERROR.

JOHN L. McGINN,
M. L. SULLIVAN,
Attorneys for Plaintiffs in Error.

CAMPBELL, METSON, DREW,
OATMAN & MACKENZIE, and
E. H. RYAN,
Of Counsel.

PRESS OF
THE JAMES H. BARRY CO.
SAN FRANCISCO, CAL.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

A. ZIMMERMAN, ED. WURZBACHER, ROY FAIRBANKS AND ANDREW JACK, *Plaintiffs in Error,*		No. 1455.
vs.		
JAMES FUNCHION AND AMY SALE, *Defendants in Error.*		

BRIEF FOR APPELLANTS IN ERROR.

STATEMENT OF THE CASE.

This was an action in ejectment brought by the defendants in error to determine their right of possession to a certain placer mining claim situated on Dome Creek in the Fairbanks Recording District, Territory of Alaska, known as Creek Claim No. 6 Above Discovery. The real dispute was as to a strip of ground lying just below the alleged north boundary line of said Creek Claim No. 6, and which may be denominated an overlap.

The defendants in error claimed this strip of ground under a location made on the 17th day of September, 1902, and the plaintiffs in error claimed it as part of their location of Bench Claim No. 6, First Tier right limit of Dome Creek, which location was made on the 12th day of May, 1904.

The testimony in the case shows that Zimmerman, one of the plaintiffs in error, went out on the ground in controversy on May 12, 1904, and no one was in the actual possession thereof. He found the lower center stake of the defendants in error, "E" (plaintiffs' Exhibit B), on which was written that the locator claimed 1320 feet up stream by three hundred and thirty feet on each side of the stake, with no reference to or call for any other monument. Zimmerman then followed a slightly blazed trail to its termination at a distance of about 345 feet, which he stepped off, and where he found another stake, mildewed, and on which there had been some writing, which was almost entirely obliterated, all but the words "Dome Creek." He naturally assumed that to be the northwest corner stake of the creek claim No. 6, it being more than three hundred and thirty feet from the said lower center stake "E," which he had first discovered at the end of the blazed trail. He therefore established his location post a few feet therefrom, designated as point "C" on defendants' Exhibit B, claiming 1320 feet up stream and 660 feet up hill (Tr., 148-9-152).

From that point he went up stream 1320 feet and established his southeast corner and from each of these stakes at points about 660 feet northerly thereof, he established his other corner stakes and partly blazed his lines (Tr., 154-5). In April, 1905, Funchion, who had originally located Creek Claim No. 6 Above Discovery, came out on the claim and blazed the alleged lines of said Creek Claim No. 6, and it was not until then that Zimmerman first became aware of the fact that Funchion claimed his northwest corner to be not at the point which Zimmerman believed it to be, but at some distance to the north and west thereof, namely, at the point "A" designated on defendants' Exhibit B, and which is admitted to be some four hundred and seventy-seven feet from the lower center stake (Tr., 52). This condition naturally caused an overlapping of the boundaries of the two claims.

In June, 1906, Zimmerman in sinking upon the ground in dispute discovered pay dirt, being the first pay streak to be uncovered on the creek (Tr., 164). And thereafter the defendants in error instituted this action.

There is no question raised as to the proper marking, discovery or the completion of the location of the claim of Zimmerman by the recordation of a proper location certificate.

It is admitted that when the defendants in error located their claim, it included an area in excess of twenty acres, and when the plaintiffs in error made

their location it covered a portion of the excessive area of Creek Claim No. 6. Up to that time, defendants in error had made no attempt to draw in their lines, nor did they do so until long after the plaintiffs in error had struck pay on the disputed ground in June, 1906, when they threw off a portion of the ground on the southern end of the location so as to make their claim conformable to the statute; but retained the disputed piece upon which the plaintiffs in error had been working steadily, sinking numerous holes to bedrock and had discovered the pay streak. The drawing in of the lines of the defendants in error took place after the institution of the suit on November 2, 1906 (Tr., p. 341), and after the ground had been surveyed by surveyors employed by both parties in September and October, 1906, respectively, the surveys returned showing conclusively that the location of the defendants in error exceeded twenty acres (Tr., p. 338, 340, defendants' Exhibit B and plaintiffs' Exhibit A). Prior to this time and after the discovery of the pay streak by Zimmerman, defendants in error had the ground surveyed by a man by the name of Jackson, who reported that it was under twenty acres in extent, but it is admitted that his survey was erroneous (Tr., 339), the other two surveys, being admitted to be, with the exception of trifling differences, substantially correct.

The contention made upon the part of the plaintiffs in error is twofold. First, that the defendants in error are bound by the marking on their lower center stake,

and secondly, having located a claim in excess of the statutory area of twenty acres, the claim was void as to such excess; and as plaintiffs in error claimed the excess in May, 1904, by a valid location, they had the better right thereto. That the defendants in error could not appropriate more than twenty acres of the public domain and exercise their discretion as to the time of throwing off the excess to the exclusion of subsequent valid locators.

The case was tried before the Hon James Wickersham, sitting without a jury, and thereafter he made his findings of fact and conclusions of law in favor of the defendants in error (Tr., 18, 25) and from the judgment entered on said findings of fact and conclusions of law, this writ of error is prosecuted by plaintiffs in error, who herewith assign the following errors upon which they rely in support of their application to this court for a reversal of the judgment herein:

SPECIFICATIONS OF ERROR.

I.

The Court erred in refusing to make the findings of fact as set forth in paragraph 1 of defendants' proposed findings of fact and conclusions of law, which reads as follows:

> "1. That the defendant, A. Zimmerman, is now, and for a long time hitherto has been, the owner in fee as to all persons save and except the United

States in possession and entitled to the possession of that certain placer mining claim described in the answer in this case, as bench claim No. 6 above Discovery on the right limit, first tier of benches on Dome Creek, in the Fairbanks Recording District, Territory of Alaska, which said claim is marked upon the ground as follows: Commencing at a point designated upon Defendants' Exhibit 'B' introduced upon the trial of said cause (reference to which is hereby made and leave asked that the same be incorporated in and made a part of the findings of fact in this case) by the letter 'C' from said point in a northerly direction uphill about 600 feet to the northwest corner stake of said claim; thence from said point 'C' north 85 degrees and 44 minutes east 1367.4 feet to a point indicated upon said defendants' Exhibit 'B' by the letter 'B.' Thence from said point 'B' uphill and in a northerly direction 600 feet to a stake which marks the northeast corner stake of said bench claim No. 6 right limit; thence west about 1320 feet to the northwest corner of said claim."

II.

The said Court erred in refusing to make the finding of fact set forth in paragraph 2 of defendants' proposed findings of fact and conclusions of law, which reads as follows:

"2. That the defendant, A. Zimmerman, on the 12th day of May, 1904, and when the above-described property was open, unappropriated, va-

cant mineral land of the United States and subject to entry for placer mining purposes, did enter upon, locate and segregate said land from the public domain by marking the boundaries of said location on the ground in such a manner that the same could be readily traced, to wit: By blazing a tree at the point indicated upon said plat by the letter 'C,' which marked the southwest corner of said claim, and by writing upon said tree so blazed substantially that the said defendant Zimmerman claims 660 feet northerly and uphill from said tree and 1320 feet upstream, for placer mining purposes, and by further marking the said claim by establishing a substantial stake at the point indicated upon the plat marked Defendants' Exhibit 'B,' upon which he wrote that he claimed 1320 feet downstream and 660 feet uphill, and by further establishing a stake about 600 feet northerly from said point designated upon said plat marked Defendants' Exhibit 'B,' by the letter 'B,' and upon which he wrote his name and marked the same as his northeast corner stake, and by establishing a northwest corner stake at a point northerly about 600 feet from the point specified upon said plat by the letter 'C,' and by cutting out and blazing the lines thereon; and did then and there so mark the boundaries of said claim upon the ground that the same could be readily traced."

III.

That the said Court erred in refusing to make the finding of fact set forth in paragraph 3 of defendants'

proposed findings of fact and conclusions of law, which reads as follows:

> "3. That thereafter and within ninety days therefrom the said A. Zimmerman caused a notice of location of said claim to be recorded in the records of the Fairbanks Recording District, District of Alaska, in which said Recording District said claim was and is located, which location notice so recorded contained the name of A. Zimmerman as locator, the date of the location as May the 12th, 1904, and described said claim with reference to adjoining claims, so that the same could be readily identified."

IV.

That the said Court erred in refusing to make the finding of fact set forth in paragraph 4 of defendants' proposed findings of fact and conclusions of law, which reads as follows:

> "4. That thereafter and in the month of June, 1904, the said Zimmerman made a discovery of gold within the exterior boundaries of the claim heretofore described, and ever since said time, and from the date of said location has resided upon said claim, working and developing the same, and been in the actual possession thereof."

V.

That said Court erred in refusing to make the finding of fact set forth in paragraph 5 of defendants' pro-

posed findings of fact and conclusions of law, which reads as follows:

> "5. That ever since said 12th day of May, 1904, defendant Zimmerman has been, and now is, the owner in fee of said property and every part and parcel thereof."

VI.

That said Court erred in refusing to make the finding of fact set forth in paragraph 5 of defendants' proposed findings of fact and conclusions of law, which reads as follows:

> "6. That the plaintiffs herein did not, at the time of the commencement of this action, nor since said time, or at any other time, own or have any estate, interest or claim in or to said property, or to any part or parcel thereof."

VII.

The said Court erred in refusing to find as conclusion of law paragraph 1 of defendants' proposed conclusions of law, which reads as follows:

> "1. That the defendant Zimmerman is entitled to a judgment ordering and adjudging that he is the owner in fee as to the property set forth in his answer in said cause, and heretofore set forth and known and described as No. 6 first tier, right limit, above Discovery, on Dome Creek, in the Fairbanks Recording District, District of Alaska, and that said

defendant is entitled to the sole and exclusive, peaceable and quiet possession of the same."

VIII.

The said Court erred in refusing to find as a conclusion of law as set forth in paragraph 2 of defendants' proposed conclusions of law, which reads as follows:

"2. That the plaintiffs herein have no estate, right, title or interest in and to said property or to any part or portion thereof, and that the defendant Zimmerman is entitled to a judgment that the plaintiffs recover nothing by this action, and that said plaintiffs have no right, title or interest in and to said property, and that the defendant Zimmerman is the owner and entitled to the possession of the whole of the property heretofore described and particularly to the portion of the same which the plaintiffs seek to recover in this action."

IX.

That said Court erred in refusing to find as a conclusion of law as set forth in paragraph 3 of defendants' proposed conclusions of law, which reads as follows:

"3. That a judgment be entered in accordance herewith."

X.

The said Court erred in refusing to make a finding of fact as is set forth in defendants' request for findings

of fact, or one of similar import thereto, which is contained in paragraph 1 thereof, which reads as follows:

"1. That on the 12th day of May, 1904, the defendant, A. Zimmerman, a prospector by occupation, while searching for open mineral land of the United States, for the purpose of locating the same, went upon Creek Claim No. 6 below Discovery, on Dome creek, and saw the lower center stake thereof, and saw written thereon that the locator, Ross, claimed 1320 feet upstream and 330 feet on each side. That there was nothing written upon said stake to indicate that at a point 1320 feet upstream, or at a point 330 feet on each side thereof, the said locator, Ross, had placed stakes or other monuments so as to mark the boundaries of said claim."

XI.

The said Court erred in refusing to make a finding of fact as set forth in paragraph 2 of defendants' request for findings, or one of similar import thereto, which reads as follows:

"2. That the said defendants, Zimmerman, after examining said lower center stake of said claim No. 6 below Discovery on Dome Creek, went to a point north one degree and two minutes east of said lower center stake 345.8 feet, and made an examination of said place, and did not see, nor was he able to find, any stake, or other monument which marked the northwest corner of said claim No. 6; but at said point he saw a small stake which he believed to be

the northwest corner stake of said No. 6 below Discovery on Dome Creek, and so believing and at said point there being nothing to indicate where plaintiffs' claimed their northwest corner stake of said No. 6 was, established a stake being the southwest corner stake of bench claim No. 6 above Discovery on Dome Creek, right limit, and then proceeded and did mark the boundaries of his said claim as is set forth in the defendants' proposed findings of fact. That the country in and about said claim and in the vicinity thereof is covered with brush and timber, and the view from one corner of said claim to another so obstructed by intervening brush and timber, and at said time, to wit, on the 12th day of May, 1904, it was impossible to determine the boundaries of the claim upon said Dome Creek unless the stakes or posted notices indicated the extent the locator claimed, or unless the lines of said claim were blazed and cut so that they could be readily traced."

XII.

That said Court erred in refusing to make a finding of fact as is set forth in paragraph 3 of defendants' request for findings, or one of similar import thereto, which reads as follows:

"3. That the location as made by the said Ross in September of 1902 contained within its limits 21.641 acres as will more fully appear from the map or plat offered in evidence on the trial of this cause marked Defendants' Exhibit 'A,' which is

hereby referred to for the purpose of more particularly showing the said excess."

XIII.

That said Court erred in refusing to make a finding of fact as is set forth in paragraph 4 of defendants' request for findings, or one of similar import thereto, which reads as follows:

"4. That the said northwest corner stake of No. 6 above Discovery on Dome Creek, as claimed by the plaintiffs, was about 480 feet in a northerly direction from the lower center stake upon which the said Ross had caused a notice to be written that he claimed 1320 feet upstream and 330 feet wide."

XIV.

That said Court erred in refusing to make a finding of fact as contained in paragraph 5 of defendants' request for findings, or one of similar import thereof, which reads as follows:

"5. That the plaintiffs herein failed and neglected to file with the recorder of the Fairbanks Recording District within ninety days from the discovery of said claim a notice of location which contained the name of the locator, the date of the location and such a description of the claim with reference to natural objects and permanent monuments so that the same could be readily identified, but on the contrary said locator caused a pretended notice of location to be filed which fails to describe the

property with reference to some natural objects or permanent monument so that the same could be readily traced and which said notice of location claimed 1320 feet down stream from the upper center stake and 660 feet in width, as will more fully appear from said notice of location, a copy of which is herewith set forth, to wit:

"'LOCATION NOTICE.

"'Notice is hereby given that I, the undersigned, has located twenty acres of placer mining ground on Dome Creek in the Circle Recording District, District of Alaska, as follows: Commencing at a stake bearing location notice and adjoining No. 7 above Discovery; thence down stream a distance of 1320 feet to a stake, thence 660 feet in width to said claim. This claim to be known as No. 6 above Discovery on Dome Creek.

"'Located this the 18th day of September, 1902.

"'JOHN C. ROSS,

"'By his Attorney:

"'JAMES FUNCHION.

"'Witnesses:

"'HERBERT E. WILLSON.

"'Filed for record October 29th, 1902, at 1:30 P. M.

"'CHARLES ETHELBERT CLAYPOOL,

"'Commissioner and Ex-Officio Recorder.

"'By J. TODD COWLES,

"'Deputy.'"

XV.

The Court erred in overruling the defendants' objections to findings of fact No. 1 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

> "1. That the plaintiffs have established that the placer mining claim in controversy described in their amended complaint as Creek placer mining claim Number Six (6) above Discovery on Dome Creek, Territory of Alaska, Third Division, was duly staked for one John C. Ross by James Funchion, his duly appointed attorney in fact, on or about September 18, 1902; the same being prior to said date vacant, unoccupied mineral ground of the United States, and that on said date and thereafter before defendants entered thereon the boundaries thereof were clearly indicated by stakes thereof so that the same could be readily traced upon the ground, and that the said stakes and monuments were placed and established as follows: That said James Funchion placed his initial stake at the upper end of said claim, approximately in the center thereof, and thereupon had written a notice of location claiming twenty acres in extent, and in size six hundred and sixty (660) feet in width by thirteen hundred and twenty (1320) feet in length. That thereafter said Funchion established his southeast corner stake, being the upper left limit corner stake, at a distance of about three hundred and one and eight-tenths (301.8) feet from his initial stake, and marked said stake as the 'left limit upper corner

stake' of said claim, and thereafter said Funchion established his northeast corner stake, being the right limit upper corner stake, at a distance of about two hundred and eighty-eight and nine-tenths (288.9) feet from his initial stake and marked the same as his 'right limit upper corner stake' of said claim; that thereafter said Funchion established his northwest corner stake, being the right limit lower corner stake, by adopting the northeast right limit upper corner stake of creek placer mining claim number five (5) adjoining said claim number six, and marked the said stake as his right limit lower corner stake, the same being at about the distance of thirteen hundred and fifteen and four-tenths (1315.4) feet from his northeast upper corner stake, and that thereafter said Funchion established his lower center stake by adopting the upper center stake of said creek claim number five (5) above Discovery and next adjoining, at a distance of about three hundred and seventy-seven (377) feet from said northwest corner stake, and faced and marked said stake as his lower center stake, and that thereafter said James Funchion adopted for his southwest corner stake the southeast left limit corner stake of creek claim number five (5) next adjoining at a distance of about three hundred and sixty-four and four-tenths (364.4) feet from his lower center stake, and faced and marked said stake as his lower left limit corner stake, and that the distance between the southwest corner stake and the southeast corner stake of said claim is about thirteen hundred and twenty-five and one-tenth (1325.1) feet. That plaintiffs acquired title from the said John C. Ross by con-

veyance, and that plaintiffs and their grantor ever since location thereof have been entitled to the possession of said claim, and have made due discovery of gold thereon in such quantities as to justify a prudent man in further expending his time and money in developing and working said claim, and ever since the year of location have expended more than one hundred ($100.00) dollars each year in working and developing the claim as assessment work thereon, and had on the 29th day of October, 1902, duly filed their location notice."

XVI.

The Court erred in overruling the defendant's objection to finding of fact No. 2 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

"2. That after the due location of said claim, and after the plaintiffs had acquired title thereto, and while they were entitled to the possession of the same, and were exercising dominion and control thereof, the defendants herein, by themselves, their servants, agents and employees, entered upon the same at a point near the northwest corner thereof, and began to mine and extract gold therefrom and were so doing at the date of the institution of this action."

XVII.

The Court erred in overruling the defendants' objection to finding of fact No. 3 of the findings of fact

signed and filed in this cause, and in making the same, which reads as follows:

"3. That when the said claim was originally located, it was staked and located in excess of twenty (20) acres, to wit, in the full area of about twenty-one and seven-tenths (21.7) acres, but that said excess was claimed unintentionally and by mistake, and that plaintiffs have occupied and possessed the same good faith in the belief that the area thereof did not exceed twenty (20) acres; and that said excess was not known and was not ascertained by either plaintiffs or defendants until after the institution of this action."

XVIII.

The Court erred in overruling the defendants' objection to finding of fact No. 4 of the findings of fact signed and filed in this case, and in making the same, which reads as follows:

"4. That the plaintiffs, before commencing this action, to wit: On or about September 1, 1906, caused a survey of said claim to be made by one R. A. Jackson, a competent surveyor, who after such survey and measurement ascertained the area thereof to be about seventeen and one-half (17.5) acres."

XIX.

The Court erred in overruling the defendants' objection to finding of fact No. 5 of the findings of fact

signed and filed in this cause, and in making the same, which reads as follows:

"5. That after the institution of this action, both plaintiffs and defendants caused surveys of the premises included within the boundaries of said claim as originally staked and marked to be made by competent surveyors, who after survey and measurement ascertained that the claim as originally staked and marked contained more than twenty (20) acres, to wit, about twenty-one and seven-tenths (21.7) acres, and such survey was received and accepted by the parties hereto as correct."

XX.

That the Court erred in overruling the defendants' objection to finding of fact No. 6 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

"6. That the said plaintiffs, when they had ascertained to their satisfaction that said claim was in excess, forthwith drew in their lines so as to disclaim such excess at a point two hundred and thirty-three and eight-tenths (233.8) feet south of the lower end center stake, as originally staked and located, and erected at said point a substantial monument and placed thereon their amended notice of location signed with their names, marking such post or monument as the 'New southwest corner stake' of said claim, and claiming therefrom to the southeast corner stake as originally located a distance of about

thirteen hundred and eleven (1311) feet, and only filed a notice of said amended location, and notified the defendants herein of their action. But that said error and miscalculation in originally staking said claim was made and committed by said James Funchion without fraud but on the contrary in good faith and in the belief that the claim did not exceed twenty (20) acres in area."

XXI.

The Court erred in overruling the defendants' objection to finding of fact No. 7 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

"7. That plaintiffs' amended location claims not to exceed twenty (20) acres, and that after duly recording the same, plaintiffs filed herein, by permission of the Court, an amended complaint claiming the area set out and described in their amended location notice."

XXII.

The Court erred in overruling defendants' objection to conclusion of law No. 1 of the conclusions of law signed and filed in this cause, and in making the same, which said conclusion of law reads as follows:

"1. That the plaintiffs, James Funchion and Amy Sale, are entitled to a judgment ordering and adjudging that they are the owners in fee, as against every person whomsoever except the United States

of America, as to the property set forth and described in their amended complaint in said cause, and known as creek placer mining claim number six (6) above Discovery, Fairbanks Recording District, Territory of Alaska, and that said plaintiffs are entitled to the sole and exclusive peaceable and quiet possession of the same."

XXIII.

The Court erred in overruling defendants' objection to conclusion of law No. 2 of the conclusions of law signed and filed in this cause, and the making of the same, which said conclusion of law reads as follows:

"2. That the defendants at the time of their entry on said premises as described in plaintiffs' amended complaint had no right, title, interest or estate in said described premises, or in any part or portion thereof, and that their entry was unlawful and without color of title, and that they have since said time acquired no right in and to said property."

XXIV.

The Court erred in overruling defendants' objection to conclusion of law No. 3 of the conclusions of law signed and filed in this cause, and in making the same, which reads as follows:

"3. That plaintiffs have judgment in accordance herewith."

XXV.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph 1 of defendants' request for conclusions based upon the findings of fact made by the Court herein, which said proposed conclusion of law is as follows:

> "1. That the defendant, Zimmerman, is now and ever since the 12th day of May, 1904, has been the owner in fee, in possession, and entitled to the sole and exclusive possession of that certain placer mining claim known as bench claim No. 6 above Discovery, on the right limit and first tier of benches on Dome Creek in the Fairbanks Recording District, Territory of Alaska, which said claim includes within its boundaries the property in controversy between the plaintiffs and the defendants herein, which has been designated as the 'overlap,' and that the plaintiffs have no estate, right, title or interest in and to the same."

XXVI.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph 2 of defendants' request for conclusions based upon the findings of fact made by the Court herein, which is as follows, to wit:

> "2. That said creek placer claim No. 6 above Discovery on Dome Creek was and is void as to the excess over twenty acres, and as said excess was claimed by the defendant, Zimmerman, on May

12th, 1904, he is now and ever since said time has been the owner in fee of the same and entitled to the sole and exclusive possession thereof."

XXVII.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph 3 of defendants' request for conclusions based upon the findings of fact made by the Court herein, which is as follows, to wit:

"3. That the defendant, Zimmerman, is entitled to recover his costs and disbursements herein, and that a judgment should be entered in accordance with these findings and conclusions."

XXVIII.

The Court erred in not making and rendering a judgment in favor of the defendants and against the plaintiffs to the effect that the defendants are the owners in fee as to all persons save and except the United States in and to the property known and described as No. 6 Above Discovery on the right limit of Dome Creek, as staked and located by Zimmerman upon the 12th day of January, 1904, and which includes within its limits the property in controversy in this action.

XXIX.

The Court erred in not making and rendering a judgment in favor of the defendants and against the plaintiffs.

XXX.

The Court erred in rendering and entering a judgment in favor of the plaintiffs and against the defendants to the effect that the claim of the defendants in and to the property in this action described is groundless and without right.

XXXI.

The Court erred in ordering and adjudging that the plaintiffs recover their costs and disbursements herein.

XXXII.

The Court erred in refusing to make and file the findings of fact and conclusions of law proposed by the defendants, and in signing and filing the proposed findings of fact and conclusions of law submitted by the plaintiffs.

XXXIII.

The Court erred in overruling the defendants' objections to the findings of fact and conclusions of law signed by the Court in this cause.

XXIV.

The Court erred in allowing the plaintiffs, over the objections of the defendants, to introduce in evidence an amended notice and certificate of location, the same being marked Plaintiffs' Exhibit 5, which is in words and figures as follows:

"Plaintiffs' Exhibit 5.

"NOTICE AND AMENDED CERTIFICATE OF PLACER LOCATION.

"We, James Funchion and Amy Sale, citizens of the United States, hereby certify that we are the owners by purchase from the original locators of that certain placer mining claim situated in the Fairbanks Recording District, Territory of Alaska, Third Division, and further described as being placer mining creek claim number six (6) Above Discovery on Dome Creek, in the recording district aforesaid. That on the 18th day of September, 1902, John C. Ross, the original locator, by his attorney, James Funchion, duly located the said placer mining claim and on the 29th day of October, 1902, caused a record of said location to be duly entered and filed in the Circle Recording District, and that the said location was in the words and figures following, to wit:

"Notice is hereby given that I, the undersigned, has located 20 acres of placer mining ground on Dome Creek in the Circle Recording District, District of Alaska, described as follows: Commencing at a stake bearing location notice and joining No. 7 Above Discovery, thence down stream a distance of 1320 feet to a stake, thence 660 feet in width

of said claim; this claim to be known as No. 6 Above Discovery on Dome Creek.

"Located this 18th day of Sept., 1902.

"JOHN C. ROSS,

"By his Attorney:
JAMES FUNCHION.

"Witness:
"HERBERT E. WILLSON.

"Filed for record Octo. 29, 1902, at 1:30 P. M.

"CHAS. ETHELBERT CLAYPOOL,
"Commissioner and ex-Officio Recorder.

"By J. T. COWLES,
"Deputy.

"That for the purpose of reducing the area of said claim and for the further purpose of curing any defects and errors in the said original certificate, and any failure to comply with the requirements of law in that respect and with the further purpose of better describing the lines and surface boundaries of the said location as amended, we, the owners, now make and file in the office of the proper recording district at Fairbanks, Alaska, this, our amended certificate of location of the said claim, and that the description of said claim will be henceforth as follows, to wit:

"Creek placer mining claim No. 6 Above Discovery on Dome Creek, the boundaries thereto being substantially as follows: Starting from the initial

stake at the upper end of said claim, approximately in the center thereof, thence northerly a distance of 269 feet to the northeast corner stake, and from said corner stake thence westerly for a distance of 1313 feet to a stake marked 'Lower right limit northwest corner stake,' between creek claims No. 5 and No. 6; thence in a southerly direction slightly to the west for a distance of 477.1 feet to another stake marked 'west and center stake'; thence in a southerly direction for a distance of 233.8 feet to a stake marked 'Lower southwest corner stake'; thence in an easterly direction for a distance of 1311 feet to a stake marked 'southeast corner stake,' thence in a northerly direction for a distance of 301.5 feet to the point of beginning.

"That we have caused a permanent monument, being a substantial post, to be erected on the lower boundary down stream between the west end center stake and the former southwest corner stake 233.8 feet from the said west end and center stake and 129.3 feet from the former southwest corner stake, which said stake will henceforth be our permanent southwest corner stake and is marked 'new southwest corner stake of creek claim No. 6 Below Discovery, amended location,' and signed with our names.

"That said amended location as above described embraces the original discovery as well as all development work which we have done or which has been performed upon or for the benefit of said original claim, and we thereby claim that this amended certificate of location relates back to the date of the original location and that it is entitled to the benefit

of the original discovery as well as all work done or improvements made by our grantors and ourselves within the limits of said amended location, or for the benefit of the original locator.

"JAMES FUNCHION,
"AMY SALE.

"(Endorsements): Indexed: No. 16,604. Notice and Amended Certificate of Placer Location Creek Claim No. 6 Above on Dome. James Funchion and Amy Sale. District of Alaska, Third Judicial Division, ss. Filed for Record at Request of C. E. Claypool on the 3d day of Nov., 1906, at 40 min. past 10 A. M., and Recorded in Vol. 7 of Locs., page 626. Fairbanks Recording District. G. B. Erwin, Recorder, by Henry T. Ray, Deputy.

"No. 572. In the District Court, Territory of Alaska, Third Division. *Funchion* vs. *Zimmerman*. Plaintiffs' Exhibit No. 5. Filed in the District Court, Territory of Alaska, Third Division. Nov. 21, 1906. E. J. Stier, Clerk. By E. A. Henderson, Deputy."

XXXV.

The Court erred after all the testimony on behalf of the plaintiffs and defendants was closed and said cause submitted to the Court for decision in ordering and directing that Herbert E. Willson go to the premises in controversy and make an inspection as to the condition of the stakes on said ground and report the same to said Court.

XXXVI.

The Court erred in admitting in evidence the said report of said Ralph Hatton, Herbert E. Willson and in considering the same, and in rendering the decision in this cause upon the said testimony of said witnesses, and not upon the said testimony of all of the witnesses upon said trial.

XXXVII.

The Court erred in not rendering a judgment in favor of the defendant, Zimmerman, to the effect that he is the owner and entitled to all that portion of said creek claim No. 6 as originally staked, which is in excess of twenty acres.

ARGUMENT.

The two points involved in this case are interpedendent, necessitating the presentation of both more or less conjointly. They are these:

1. Creek Claim No. 6 when located by the defendants in error was admittedly in excess of twenty acres, and the lines had not been drawn in nor was there any *pedis possessio* when plaintiffs in error located, nor until long after the institution of the action. The area being in excess of the statutory limits, rendered the location of said claim void as to such area.

2. That Funchion in locating the claim for Ross and in placing his lower center stake and designating

thereon the amount that he claimed, namely, 1320 feet up stream, together with 330 feet on each side thereof, without designating any course or distance therefrom to another stake, was bound by his claim of 330 feet on each side, and no subsequent prospector would be required to look beyond the 330 feet distance to discover any monuments marking off the boundaries of the claim. Certainly not 147 feet more—more than one-third of 330 feet. That having so designated the amount of ground *claimed*, which was within the legal amount, the alleged staking of the location away beyond such claimed limits was not a marking distinctly of the boundaries in compliance with the statute so that they could be readily traced on the ground; and any subsequent locator would have an absolute right to locate to include such excess, unless the original locator was in the *actual* possession of such excess actively engaged in mining the same.

We beg to call the attention of the Court to the following facts clearly disclosed by the evidence and practically undisputed.

It will not be necessary to consider the evidence as an entirety. There is no dispute practically as to the location of the creek claim originally by Funchion. There is none as to the location of the Bench Claim No. 6 by Zimmerman. There is no practical dispute as to the writing on the lower center stake "E" of Funchion's claim. (Defendants' Ex. B.) The only real dispute in relation to the marking of the claim of Fun-

chion, was as to where the northwest corner or lower right limit corner stake was placed. It was the contention of defendants in error that it was placed at the point designated on said Exhibit "B" as "A," which would be 477 feet from the lower center stake, designated on said exhibit as "E." The contention of plaintiffs in error was that said corner stake was at the point designated on said Exhibit "B" as "C," which was some 345 feet from the said lower center stake. Funchion testified that he in company with Herbert Willson staked the claim on September 17th or 18th, 1902. That they put in the upper center or initial stake first at "H" (Defendants' Ex. B), and that they wrote on it that they claimed 1320 feet by 660 feet in width (Tr., 38, 40, 48). That while Willson was establishing the lower center stake at "E" (Defendants' Ex. "B") Funchion went up the hill and established the upper corner stakes at "B" and "G" respectively, as designated on said map, and thereafter Willson established the northwest corner stake at "A" at a point 477 feet from the point "E," the lower end center stake. Funchion says he doesn't remember just what Willson wrote on the lower center stake "E" (Tr., 50), but that the distance therefrom to "A" was 477 feet, and the distance from there to "F," the lower left limit corner stake, was 364 feet (Tr., 52), which would make the lower end of his claim some 844 feet wide as opposed to his upper width as shown on Defendants' Exhibit "B" to be 590.7 feet, being 301.8 and 288.9 feet re-

spectively on either side of the upper center stake "H" (Tr., 340).

Funchion after locating the claim did not return thereto until 1903, when he went over there with Ross, the man for whom the claim was originally staked, and sunk a hole to bed rock some 22 feet deep, down near the creek, *not on the disputed territory*, and, with the exception of having the assessment work done, did not do anything further to the location or return thereto until April, 1905, when he came on the ground and visited Zimmerman in his cabin, where the latter had been living since September, 1904, on Bench Claim No. 6 (Tr., 163).

It is in evidence that Zimmerman showed him some coarse gold that he had taken from the ground (Tr., 156) and a week later Funchion and a man by the name of McPike came out on the ground and blazed out all the alleged lines of Creek Claim No. 6, showing them to run from "A" to "B" to "F" to "G" and including "E" and "H" (Defendants' Exhibit B).

This disclosed to Zimmerman for the first time that Funchion claimed as his northwest corner the point designated as "A" on the said Exhibit. According to Zimmerman, while he had discovered this post about a month after he had located his claim, there was nothing on it to indicate that it was a corner post or monument of the creek claim, but it bore a notice that it was the right corner post of No. 5 Bench and also the notice of a man by the name of McQuillan, which was taken off

when Funchion and McPike visited the claim in April, 1905. Funchion admits that he effaced the markings on that stake at this time, and wrote his own name on it, claiming that it was his stake and his writings had become obliterated (Tr., 62-3).

Willson, who assisted in the staking of the Funchion claim, testified pretty much along the same lines as did Funchion, but while he testified to establishing stake "E," the lower end center stake, he wasn't positive as to whether he wrote 330 feet on each side of 600 feet wide in addition to claiming 1320 feet up stream. "He really forgot what he did write" (Tr., 80). However, there can be no question as to what was actually written on this stake, as in addition to the positive testimony of Zimmerman that the said post was marked 1320 feet up stream by 330 feet on each side, we have the testimony of Cook, who testified to seeing this lower center stake with the same inscription in January, 1905 (Tr., 210); of Hatton, who said that he saw it in December, 1904, and of their own witness Bush, who also testified to the same effect (Tr., 232).

It appears from the testimony of Zimmerman that on the day he made his location, he went to the point designated as "E" on the map (Defendants' Exhibit B), which was the lower center post of the Creek Claim No. 6, and on which was written this inscription of 1320 feet up stream by 330 feet on each side thereof (Tr., 148). That from there he went in a northerly direction a little to the west along a slightly blazed trail, to

where he found another post, about 345 feet from the lower center post, he having stepped it off twice to make sure of the distance. This post was mildewed, and had some writing on it, but as it was in the afternoon and dark when he was there he could not distinguish all of the writing, but made out the words "Dome Creek." In finding this post at such a point and at such a distance from the lower center post, taking into consideration the distance claimed on each side of the said lower center post, he naturally took it for granted that this must be the north-west corner stake of Creek Claim No. 6, and staked his location accordingly. His testimony as to this post is corroborated by that of both Cook and Hatton, who stated that a careful examination of the post showed a writing indicating that it was the corner post of No. 6 Above Discovery, being designated as such corner post (Tr., 196, 204). After stepping off the 345 feet and discovering the post at this point, Zimmerman decided to establish and did so establish his south-east corner post a few feet from it, and proceeded to make his location. He blazed a line through along the creek for his corner post, went up to the upper end and found the upper corner post of Creek Claim 6 (Tr., 151), and then established the south-east corner of his claim; then going up the hill to the north-east corner established a post, then down to the north-west corner where he established another post and completed his marking (Tr., 152, 154). Thus he natur-

ally included within his boundaries the disputed piece of ground.

It should be borne in mind that the defendants in error never were in the actual possession of the ground in dispute, nor in fact of the other portions of their claim; no attempt being made to show actual possession on their part, nor did they ever do any work on the ground in dispute. The only work done being, as claimed, the annual assessment work, if any, and the hole dug to bedrock down near the creek (Tr., 42).

Funchion testified that he knew that Zimmerman was on the ground from May 12, 1904, claiming up to his stakes, and that Zimmerman had always claimed to them, defendants in error, that they were too wide at the lower end (Tr., 59).

After the institution of the action and *after* the surveys were made showing the excessive area of the claim of defendants in error, as we have hereinbefore suggested to the Court, defendants in error notified the attorneys for plaintiffs in error that they intended to amend their location so as to make it conform to law, by placing a new lower southwest corner stake at a point 233.8 feet from the lower west end center stake and to file for record an amended location certificate in accordance therewith, which was ultimately done on the third of November, 1906. This drawing in of the lines of Creek Claim No. 6 retained the part in dispute on which Zimmerman had been working, digging holes to bed rock, *and on which he had demonstrated that the*

pay streak lay, but cut off the southern portion of the claim, which had not been shown to be of any value.

Upon practically these facts the court below found that the claim of Funchion to the disputed ground was superior to that of Zimmerman. In other words, the court held that where a placer locator makes a location in excess of twenty acres he has power to reserve his right to throw off the excess for an indefinite period, irrespective of valid intervening rights accruing on the excess of area, and irrespective of the fact that he is not in the actual possession of the disputed ground when the subsequent entry is made.

This is not and can not be the law.

I.

The law seems to be clearly settled that where a mining claim is located in excess of the statutory area, in good faith, and injures no one at the time it is made, it is void only as to the excess.

Lindley on Mines, Sec. 362;
Snyder on Mines, Sec. 398;
English vs. *Johnston*, 17 Cal., 108, 117;
Howeth vs. *Sullenger*, 113 Cal., 547;
Thompson vs. *Spray*, 72 Cal., 528;
Jupiter M. Co. vs. *Bodie Cons. M. Co.*, 11 Fed., 666;
Patterson vs. *Hitchcock*, 3 Colo., 533;

Taylor vs. *Parenteau,* 48 Pac., 505;
Hanson vs. *Fletcher,* 37 Pac., 481;
McPherson vs. *Julius,* 95 N. W., 428-435;
McElliott vs. *Keogh,* 90 Pac., 823, 825.

The rule laid down in Montana is far more strict and where a claim is located and the outlying boundaries indicate a location in excess of the statutory area, not the excess alone, but the whole location is held void.

Leggatt vs. *Stewart,* 5 Mont., 107, 15 Mor. M. Rep., 358;
Hauswirth vs. *Butcher,* 1 Pac., 714.

However, we are not contending that such is the general law, but are content to hold with the principle laid down by both Snyder and Lindley in their text books, that the sound rule is that the excess alone is void.

But the question to be decided herein is, when is such excess open to occupation by a subsequent locator? When and how is such excess to be determined? A miner locating a valid claim is treated as a licensee of the government, and independent of a purchase from the United States by obtaining a patent therefor, where he complies with all the provisions of the mining laws, is entitled to the property and to appropriate all the minerals contained therein. The government holds out a standing offer to him of a title in fee by way of patent, but he may accept or reject it at his pleasure.

In the meantime he can exhaust the substance of the claim, the minerals therein, and keep all others out. Practically he does not need a patent.

The law says with reference to placer mining locations, "No such locations shall include *more than twenty acres* for each individual claimant." (Italics are ours.)

Sec. 2331, R. S. U. S.

And the policy and object of the law is to limit the quantity of placer mineral land which may be located by one claimant to twenty acres.

Mitchell vs. *Cline,* 84 Cal., 415.

If, as is the only deduction from the findings and judgment in this case, a locator can by so marking his boundaries in defiance of the stattuory mandate, even doing so innocently, take up 22 acres of mineral land, and without working it or being in actual possession of it, maintain his right at any time within his discretion to reject the excess and elect to draw in his lines in such a manner as to include the ground proven to be valuable by the hard work of a subsequent locator on such excess, or exclude any subsequent locator therefrom entirely, why can not he take up twenty-five, thirty or forty acres and pursue the same course? The principle is the same, and yet if this be so, would not the very object of the statute be defeated, namely, the purpose

to limit individual placer locators to twenty acres of ground?

And what protection is there to a subsequent honest prospector, who, roving the public domain in search of unoccupied ground, finds, as in this instance, a stake claiming 1320 feet up stream and 330 feet on each side. Guided by such stake he paces the ground off a distance of fifteen feet more than the claimed three hundred and thirty feet, and then proceeds to make his location outside thereof. There is no one on the ground, no evidence of occupation or of diligent mining for minerals. He proceeds to locate, works assiduously, discovers the pay streak, and then after two years, the original locator, who has done nothing but hold constructive possession of the claim, comes along and says:

> "You made a mistake when you read that location notice. I placed my upper corner stake 480 feet beyond the lower center stake that you found where I claimed 330 feet on each side. You were mistaken in my boundaries, but I now exercise my right of election and have decided to draw in my lines to include your ground. It is true I staked too wide, that you told me I had staked too wide, but still I staked and you are within my outlying boundaries on that side, and the valuable mine you have uncovered belongs to me."

Does the statute contemplate any such procedure? It can hardly be within the bounds of reason or of justice that such can be the law.

Says Beatty, J., in the case of *Gleeson* vs. *White Mining Co.*, 13 Nev., 462:

> "The object of the law requiring the marking of boundaries is designed to prevent floating or swinging so that those who in good faith are looking for unoccupied ground in the vicinity of a previous location, may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue. The provisions of the law designed for the attainment of this great object are most important and beneficent and they ought not to be frittered away by construction."

Would not the very object of the law in this respect be rendered nugatory, if the decision of the lower court upon the facts of this record is held to be the law? In that case all that one need do would be to take up a piece of placer mining land, post a misleading notice similar to the one at bar, place his stakes away outside of the statutory area, do the requisite assessment work, and then wait for the poor fly, guided by the notice, to fall into his web, by locating over the excess of area in his location under an honest belief in its being unappropriated. If he is not successful in laying bare the pay streak, do nothing. If he succeeds by diligent efforts and the expenditure of time and money in making a "strike," draw in your lines to include his labors. In other words, "float" or "swing" your claim as expediency suggests.

The Supreme Court of Montana in discussing a similar condition says pertinently:

> "The claim in question as shown by the stakes and boundaries thereof, is 2000 feet in length, whereas the greatest length as authorized by the law is 1500 feet. If such a location could be sustained to the extent of 1500 feet, *where the rights of third persons had not intervened, which we do not decide, certainly if such rights had attached, such a location would not protect 500 feet in length of claim more than the law authorizes, by virtue of one discovery. A 1500 feet claim can not be shifted from one end to the other of a 2000 feet claim as circumstances might require, to cover the discovery of a third person within such 2000 feet location.*"

Hauswirth vs. *Butcher,* 1 Pac., 714.

And says Sawyer, J., in the case of *Mt. Diablo M. & M. Co.* vs. *Callison,* 5 Sawy., 449:

> "The locator should make his location so certain that the miners who follow him may know the extent of his claim and be able to locate the unoccupied ground *without fear that when they shall have found a paying mine the theretofore indefinite lines of some prior location may be made to embrace it.*" (Italics ours.)

Can the defendants in error be said to have done this? For if the point designated as "C" was not their northwest corner post, admitting that "A" was such

post, it was 480 feet from the lower center stake which claimed 330 feet on each side thereof by a length of 1320 feet, which would cover the statutory area of twenty acres. A locator is presumed to take all that the law allows him, and such presumption was indulged in by Zimmerman with reference to the Funchion claim.

> "The area bounded by a location must be within the limits of the grant. No one would be required to look outside of such limits for the boundaries of a location. Boundaries beyond the maximum extent of a location would not impart notice, and would be equivalent to no boundaries at all."
>
> *Hauswirth* vs. *Butcher,* 1 Pac., 714.

And in this case the writing on the lower center stake imparted notice to Zimmerman as to what extent of ground was claimed. Here was an express declaration of the length of the claim, and the width claimed on each side. What more could be expected of a subsequent locator than that he should measure the ground therefrom, as did Zimmerman, in order to see that he was without the extent claimed, before he located?

Lindley on Mines, Sec. 362.

Every man is presumed to know the law. If Zimmerman could, by a slight effort of the will, step off the ground in order to ascertain the actual ground which three hundred and thirty feet distant from the point "E" would cover, what was there to prevent Funchion from

doing likewise and establishing his post within a reasonable estimate of that distance, instead of 150 feet further up? A man may make a mistake of a few feet, of ten, say, or twenty or perhaps even fifty, but when it reaches one hundred and fifty feet, while the excess on the south side was only thirty feet, he should not be heard to complain when a subsequent locator takes pains, after reading his express declaration, to measure the ground in accordance therewith and arrive at a conclusion that a post just 345 feet away is his corner post. The object of a notice of this sort is to guide a subsequent locator and to afford him information as to the extent of the prior locator, and where the prior locator has made such a declaration he can not be permitted to ignore it, and stake out his boundaries with no reference thereto.

> "The least that can be required of locators is that the corner stakes shall not be so far apart as to include an area greater than the size of the claim as described in the posted notice, or greater than the law allows to be included in a single claim. . . . *In such a case the excessive distance between the corner stakes is misleading, and a locator who has committed such an error has failed to comply with the law.*" (Italics ours.)

Ledoux vs. *Forester,* 94 Fed., 600.

But if Funchion had placed but two stakes, one at the upper and one at the lower end center of the claim, and

had written upon the lower end center stake that he claimed 1320 feet up stream by 330 feet on each side thereof, that would have been a sufficient marking, so far as Zimmerman was concerned under the circumstances of this case, to comply with the law and to afford to Zimmerman an opportunity of estimating the length and breadth of the claim.

McKinley Creek M. Co. vs. *Alaska United M. Co.*, 183 U. S., 563;

Loeser vs. *Gardiner*, 1 Alaska Rep., 641;

Jupiter M. Co. vs. *Bodie Con. M. Co.*, 11 Fed., 666;

North Noonday M. Co. vs. *Orient M. Co.*, 1 Fed., 533;

Gleeson vs. *Martin White M. Co.*, 13 Nev., 442.

The fact that Funchion did more than this, and placed his northwest corner stake 480 feet instead of 330 feet distant, entirely misleading subsequent locators, can not be deemed an element in his favor in considering the question before the Court as to his right to throw off the excess, or as militating against Zimmerman, who acted in good faith and who actually located, not on the area that Funchion was entitled to, but on the excess to the extent of which the law declares Funchion's location to be void. If void, then it was still a part of the unoccupied public domain, especially under the facts of this case where no possession or occupation

thereof was shown, and Zimmerman was within his legal rights when he located to include this excess.

A different rule might probably be applied had an *actual* possession been shown on the part of Funchion at the time of the alleged ouster, diligently working on the ground.

In the case of *M'Intosh* vs. *Price*, 121 Fed., 716, where the prior locator was in the *actual possession* of the admitted excess *diligently working in good faith on the same*, it was held he was at liberty to elect what portion he would reject of his alleged excessive location or what retain, this Court saying:

> " . . . We are very clearly of the opinion that if any portion of the ground located by the Kjelsbergs was subject to relocation as being in excess of the permitted width, the owners thereof in possession under the circumstances found by the trial court, could not be deprived of the right to select the portion thereof which they would elect to hold, and that another locator had no right to enter upon that portion of the claim *in which they were working, and which was the valuable portion thereof, and oust them from the possession by making a location thereon.*"

The case of *M'Intosh* vs. *Price* involved the question of when the excess is to be considered open to appropriation by a subsequent locator. But actual possession of the prior locator gave him the right to designate where the excess should be cut off, and his being

in the actual possession of the disputed strip was a sufficient election by the first locator.

It is difficult to find adjudicated cases on all fours with the case at bar, but logical reasoning would suggest that the law must be in accordance with the argument advanced by us, that where a locator monuments a piece of ground in excess of the amount allowed by law, and makes no attempt to actually occupy the same or to work it for the minerals *supposed* to be contained therein, and the fact of the excessive area is patent to all subsequent locators, made so by the express declaration of the original locator by the writings on his stakes, there is no rule of law that will allow such prior locator to hold such excess indefinitely to the exclusion of valid locators in good faith thereon.

The case of *McPherson* vs. *Julius*, reported in 95 N. W., 428, is, however, in point, and instructive, as the facts are analagous to some extent. There a locator staked the Wasp No. 2 claim in 1893, and embraced within its boundaries an excessive area of some 161 feet embodied within a prior location,—the Hilltop. In 1894, a year later, the Hilltop drew in its lines so as to exclude this area. Upon it being claimed by a subsequent locator within the lines of the Wasp No. 2, that the latter's location was void because of its inclusion of this portion of the Hilltop, the Court in holding the Wasp No. 2 a valid location, uses the following language:

"It is further contended by the appellants that at the time the Wasp No. 2 made its location, the ground in controversy was within the exterior boundary lines of the Hilltop as staked, and therefore it acquired no right to that ground.

"But as we have seen, the Hilltop was located 161 feet too long, and in 1894 it drew in its south end line, leaving the ground in controversy outside of its claim. Its *location was void as to the excess, and the excess of the Hilltop within the exterior boundary lines of Wasp No. 2 became a part of that claim, subject of course to any prior valid claim.* A location made conflicting with another prior location if a proper discovery is made, is valid against all persons except the prior locator, and if the claim of the prior locator is abandoned, forfeited, *or any part of the claim in conflict is not rightfully held by the prior locator, the subsequent location attaches to so much of the ground not legally held by the prior locator as is within the lines of the subsequent location.* We are of the opinion, therefore, that the excess constituted a part of the Wasp No. 2 as against the Little Blue Fraction." (Italics ours.)

II.

Such being the law under our view, we contend that the Court necessarily erred in refusing to make findings of fact in accordance with the request of plaintiffs in error and as embodied in Assignments of Error I, II, III, IV, V, VI, X, XI, XX, XIII, as the same were, as we have shown, warranted by the evidence in the case and stated the exact facts.

III.

The Court erred in refusing to find as a conclusion of law upon the request of the defendants, to the effect that Zimmerman was entitled to a judgment decreeing that he was the owner of the property set forth and described in his answer and entitled to the exclusive possession of the whole thereof, and that the plaintiffs in the action had no right or title thereto, and further that a judgment should be entered in accordance with such conclusion of law as embodied in Assignments of Error VII, VIII and IX. Said proposed conclusions of law were not alone warranted by the evidence in the case, but stated the law correctly as a deduction from said evidence, and for the reasons hereinbefore stated the Court should have made such conclusions of law.

IV.

The Court erred in refusing to make a finding of fact as requested by the defendants in error and as embraced in Assignment of Error XIV, to the effect that the plaintiffs had failed to file with the recorder of the Fairbanks Recording District a proper notice of location in that the same had no reference to a natural object or permanent monument.

The notice reads as follows:

> "Notice is hereby given that I, the undersigned, has located twenty acres of placer mining ground

on Dome Creek, in the Circle Recording District, District of Alaska, as follows: Commencing at a stake bearing location notice and adjoining No. 7 Above Discovery; thence down stream a distance of 1320 feet to a stake, thence 660 feet in width to said claim. This claim to be known as No. 6 Above Discovery on Dome Creek. Located this the 18th day of September, 1902.

"JOHN C. ROSS,
"By his attorney, JAMES FUNCHION.

"Witnesses: Herbert E. Willson.

"Filed for record October 29, 1902" (Tr., p. 306).

Under Sec. 15, Part III, Ch. 1, Carter's Annotated Codes of Alaska, it is necessary that the locator of a mining location shall record his notice within ninety days from the date of the discovery of the claim.

By Section 2324 R. S. U. S., it is provided that where a recordation of a certificate of location is required by the statute, it must contain such a description of the claim or claims located by reference to a natural object or permanent monument as will identify the claim.

This provision is mandatory.

Lindley on Mines, Hammer vs. *Garfield M. Co.*, 130 U. S., 291;
Darger vs. *LeSieur,* 30 Pac., 364;
Faxon vs. *Bernard,* 4 Fed., 402;
Gird vs. *California Oil Co.,* 60 Fed., 531, 536.

Says Judge Ross in the case last cited:

> "The record of a mining claim, where one is required, *is intended to contain a more exact and specific description of the claim than the notice posted on it.*" (Italics ours.)

And the Supreme Court of the United States in the case of *Hammer* vs. *Garfield*, *supra*, states clearly what the provision of Section 2324 in this respect was meant to secure, to wit:

> "These provisions *as appears on their face,* are designed to secure a definite description, one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose." (Emphasis ours.)

Can a reading of the notice in question be said to even remotely comply with the statute? There is no such definite description of the claim as will serve to identify it by a reference to either a natural object or a permanent monument. It can not be said that there is any description of the claim in such notice as would serve to guide an intelligent prospector to the claim with reasonable certainly. And *reasonable* certainty is what is absolutely required in order to make the certificate sufficient.

> *North Noonday M. Co.* vs. *Orient M. Co.*, 1 Fed., 522.

In the absence of such a reference the certificate had no validity, as it was not a compliance with the law, and the Court should have so found as a matter of fact.

V.

The Court erred in overruling defendants' objections to Finding of Fact No. 1 signed and filed in the cause (Assignment of Error XV), and especially to that portion thereof which found as follows:

> "That thereafter said Funchion established his northwest corner stake, being the right limit lower corner stake by adopting the northeast corner right limit upper corner stake of Creek Placer Mining Claim No. 5 adjoining said claim No. 6, and marked the said stake as his right limit lower corner stake, the same being about 1315 feet from his northeast upper corner stake."

Said finding is not supported by the evidence, and is, in fact, contrary thereto. There is no testimony that Funchion adopted the northeast corner right limit upper stake of Creek Claim No. 5, or that he marked it "the right limit upper corner stake."

Funchion testified in relation to the placing of this northwest corner (conceding that said corner was placed at said time, which we contest):

> "Herb (Willson) went up the creek to No. 7. . . . . Then when he came down, on our way down, we put out the lower stake. He and I went

out and put out that lower right limit corner stake. He put it out and I blazed the lines. Q. Who marked it? A. *He marked it the corner between 5 and 6 claims;* it was the dividing corner between both claims. . . . " (Tr., 41).

While Willson says:

"That he put out that stake, that lower right limit corner stake. Q. What was it, Mr. Wilson. A. It is a tree. Q. Of what size? A. About four inches. Q. What did you do with it? A. I wrote the corner notice *on it, 'upper corner stake of 5, lower corner of 6'* " (Tr., 72).

In other words, there was not alone no corner stake of Creek Claim No. 5 *to adopt,* because if the testimony of Wilson is true, he staked both corners at the same time, but the language found by the Court to be inscribed on this stake was not the writing testified to by either Willson or Funchion.

VI.

The Court erred in overruling the objection of defendants to Finding of Fact No. 2 of the findings of fact signed and filed in the cause (Assignment of Error XVI) and especially to that portion thereof as follows:

"And after the plaintiffs had acquired title thereto, and while they were entitled to the possession thereof, *and were exercising dominion and control thereof,*"

as the same is not based on any evidence in the record, is untrue, and was an attempt on the part of the plaintiffs to show an actual possession.

> "By actual possession is meant a *subjection to the will and dominion* of the claimant, and is usually evidenced by occupation—by a substantial enclosure—by cultivation or by appropriate use according to the particular locality and quality of the property."
>
> *Coryell* vs. *Cain,* 16 Cal., 574.

> "Ordinarily the expressions 'occupation,' *'possessio pedis,' 'subjection to the will and control,'* are employed as synonymous terms *and as signifying actual possession.*" (Italics ours.)
>
> *Lawrence* vs. *Fulton,* 19 Cal., 690.

There is not an iota of evidence showing that the defendants in error were on any of the ground comprising their alleged location when Zimmerman entered on the excess thereof, much less on the strip in dispute, or that they exercised any acts of dominion or control over it. By such a finding there is an attempt to bring the case within the principle laid down in *M'Intosh* vs. *Price* hereinbefore discussed, and we contend that such finding is fatal error, as it goes to a vital point in the case which may have been decisive of it.

The judgment, therefore, based upon such a finding, there being no evidence to support it, must be reversed.

White vs. *Douglas*, 71 Cal., 115;
Bolton vs. *Stewart*, 29 Cal., 615.

VII.

The Court erred in overruling defendants' objections to Finding of Fact No. 4 (Assignment of Error XVIII), as the same was purely evidentiary and the survey was admitted to be erroneous by the two surveys subsequently made; and error was also exhibited in Finding of Fact No. 5 (Assignment of Error No. XIX), as the same embodied evidentiary matter not relevant or material to the issues raised by the pleadings.

VIII.

Finding 6 of the Court (Assignment of Error XX), is erroneous in that it is irrelevant and immaterial to the issues raised and embraces matters accruing subsequent to the institution of the action. This finding bears upon the fact that Funchion drew in his lines after the surveys had been made, disclosing his area to be excessive, and also filed a notice of amended location at the same time. While said finding is based upon evidence to that effect, the further finding therein that the "error and miscalculation in originally staking said claim was made and committed by said James Funchion without fraud, but, on the contrary,

" in good faith and in the belief that the claim did not " exceed twenty acres," is not supported by the evidence given on the trial and is contrary thereto. There is nothing in the record showing that Funchion miscalculated the distance between either side of his lower center stake and his corner posts unintentionally. He made a pretty wide guess on the south end by exceeding the 330 foot limit claimed by only 34 feet; he also estimated his distances on the upper end of his claim fairly well, as evidenced by the maps introduced in evidence, but why he did not exercise the same judgment on the north side of his lower center stake instead of "miscalculating" 150 feet is a conundrum. Or perhaps is it not more reasonable to suppose that he did not "miscalculate" to such a degree but that his lower right limit corner post was where Zimmerman, Hatton and Cook claimed it to be, and where Zimmerman found it after stepping off 345 feet from "E"?

But if he did miscalculate or was negligent, who is to suffer? The one who was negligent or wrong, or those who were not?

IX.

The Court erred in allowing to be introduced in evidence over the objection of the plaintiffs in error, the amended certificate of location of the defendants in error filed for record on November 3, 1906, long after the institution of the action, and long after the inception of the rights of the plaintiffs in error (Assignment of Error XXIV).

In order that the amended location certificate of the defendants in error should have any value, or relate back to the date of their original certificate, their location must have been a valid one. The right to file an amended certificate of location is subject and subservient to intervening adverse rights; and under the position that we take on the law controlling in this case, and of our right to locate upon the excessive area of the location of the defendants in error, the same being void, no amendment of the location of the defendants in error could be made upon ground already appropriated by us, and no certificate of record showing an amended location after our rights had intervened could have any materiality.

Such a certificate could not create a right of possession or location in the premises which did not exist prior to the filing thereof, and it could confer no additional rights and therefore could be evidence of none as against the plaintiffs in error.

Strepy vs. *Stark,* 5 Pac., 111, 115.

That seems to be the keynote of the decisions; that an amended certificate may be filed at any time and have value *if* it does not interfere with the existing rights of others. See *Morrison* vs. *Regan,* 67 Pac., 956, decided with reference to a statute permitting the record of an amended location where the Supreme Court of Idaho say:

"That section provides for the amendment of original certificates of location, and provides that if the locator shall apprehend that his original certificate was defective or erroneous, or that the requirement of the law had not been complied with, etc., such locator or his assigns may file an amended certificate curing such defects and such amended certificate relates back to the date of the original location, *provided that it does not interfere with the existing rights of others.* Most, if not all, of the mining States have similar statutes that have been considered and construed by the Federal courts and the Supreme courts of those States. From such statutes and the decisions under them, it is clear that an amended certificate may cure a defective or erroneous certificate and relates back to the original, *except when such original certificate is absolutely void, or when the rights of others have intervened between the date of the original and amended locations.*"

As the record shows, the rights of plaintiffs in error had intervened, before the filing of the amended certificate, and the excess of area of Creek Claim No. 6 was lost to the defendants in error by the valid appropriation thereof by Zimmerman.

McPherson vs. *Julius,* 95 N. W., 428.

Any attempt on the part of defendants in error to thereafter locate over the ground of plaintiffs in error (which was really what they attempted to do by the so-called drawing in of their lines) or to file additional

or amended certificates of location would be mere wasted energy on their part, under our view of the law.

In conclusion, we submit that the question before the Court in this case in its relation to locations covering excessive areas and the rights of subsequent locators thereon is one of importance to miners, and one which is as yet practically undecided *in toto*. We believe that the lower court erred in its construction of the law as applied to the facts of this case, and that judgment should have been rendered for the plaintiffs in error. For the errors assigned, we ask that the judgment be reversed.

JOHN L. McGINN,
M. L. SULLIVAN,
Attorneys for Plaintiffs in Error.

CAMPBELL, METSON, DREW, OATMAN & MACKENZIE, AND E. H. RYAN,
Of Counsel.

No. 1455.

United States Circuit Court of Appeals

IN AND

FOR THE NINTH CIRCUIT.

A. ZIMMERMAN, ED. WURZBACHER, ROY FAIRBANKS, and ANDREW JACK,

Plaintiffs in Error,

vs.

JAMES FUNCHION and AMY SALE,

Defendants in Error.

Reply Brief

~~Statement of the Case~~ on Behalf of Defendants in Error.

CLAYPOOL, KELLUM & COWLES, and
FERNAND de JOURNEL,
Attorneys for Defendants in Error.

T. C. WEST,
Of Counsel.

PRESS OF THE JAMES H. BARRY CO.
212-214 LEAVENWORTH ST.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

A. ZIMMERMAN, ED. WURZBACHER, ROY FAIRBANKS and ANDREW JACK,
Plaintiffs in Error,
vs.
JAMES FUNCHION and AMY SALE,
Defendants in Error.

No. 1455.

STATEMENT OF THE CASE ON BEHALF OF DEFENDENTS IN ERROR.

This is an action in ejectment brought by the defendants in error to determine the right of possession to a certain placer mining claim known as Creek Claim No. 6 Above Discovery, on Dome Creek, in the Fairbanks Recording District of Alaska.

The dispute between the plaintiffs in error and defendants in error is as to a three-cornered strip of ground lying just south of the northerly boundary line of the claim mentioned. The defendants in error lo-

cated this strip of ground under location made on the 17th day of September, 1902, as part of their said Creek Claim No. 6, and the plaintiffs in error claim it as part of their location of Bench Claim No. 6, First Tier on the Right Limit of Dome Creek, under their location made on the 12th day of May, 1904.

The testimony shows that Funchion, one of the defendants in error, located said Creek Claim on behalf of one John Cameron Ross on said 17th day of September, 1902, and that he put out his initial post, marked "H" on defendant's Exhibit B, as his upper center post, and at the same time staked the upper or east end corners marked as "B" and "G" on said exhibit; that he also staked his initial post at the point marked "E" on said Exhibit B, and his lower right hand corner post at "A" on said exhibit, and finally his lower left hand post at "F."

The testimony further shows that at the time of setting out and marking said posts, the defendant in error Funchion also blazed a trail from his lower initial post "E" to his lower right hand corner post "A."

The testimony of the defendant in error Funchion also shows that upon his upper initial post "H" he placed a notice that he claimed 1320 feet downstream and 660 feet in width, and a similar notice was placed on his lower initial post "E," claiming 1320 feet upstream. There is a conflict of testimony given by the plaintiff in error, Zimmerman, and the defendant in error, Funchion, as to the wording of these notices, the

plaintiff in error, Zimmerman, claiming that the notices read 1320 feet up or down stream and 330 feet on each side of the posts, and the defendants in error claiming that it read 660 feet wide. The undisputed testimony also shows that the defendant in error, Funchion, in 1903, sank a hole within the limits of his said Creek Claim No. 6 to the depth of about 22 feet to bedrock and discovered gold in paying quantities. It is admitted on all hands that the claims were recorded by the respective parties within the time required by the statute.

After the commencement of the action, the defendants in error discovered for the first time that their claim was in excess of the 20 acres authorized by the statutes, and they thereupon filed a notice of abandonment of the excess so staked by them, and relocated their claim as set out in Exhibit C (Trans. of Record, p. 341), and thereupon, by leave of the Court, filed their amended complaint, claiming the ground embraced in their relocation.

The real dispute between the parties seems to hinge on the question of the location of the lower right hand corner stake, as to whether it was located at the point marked "A" or the point marked "C" on defendants' Exhibit B. There being a very serious conflict of evidence upon this point, the learned trial judge directed Herbert Wilson, a witness on behalf of the defendants in error, and Ralph Hatton, a witness on behalf of the plaintiffs in error, to proceed to the claim and examine

said stakes afresh, and to report to the court (see Trans. of Record, p. 264).

On reporting to the Court it was found that the witness Hatton, who had previously testified, on behalf of the plaintiffs in error, that said lower right hand corner stake was located at the point marked "C" on said Exhibit B, admitted that he was mistaken and that such lower right hand corner stake was situated at the point claimed by the defendants in error, viz., "A" on said Exhibit B. The Court therefore found as a fact that that is where said corner post was located by the defendants in error. Legal conveyances of the claim in question from John Cameron Ross to the defendants in error are admitted by all parties.

ARGUMENT.

All the questions of fact being found by the trial judge in favor of the defendants in error, this Court will not disturb the findings, and it seems to the writer that but one question remains, viz., whether the defendants in error had the right, as a matter of law, to abandon the excess of their location on either side, or whether they were compelled to abandon the excess that was included in the alleged location of the plaintiffs in error.

There is no question but that the defendants in error located their claim in good faith on the 17th day of December, 1902. There is also no question but that they discovered gold within the limits of their claim

and outside of the portion thereof afterwards abandoned as excess in 1903, and that their notice of location was duly recorded within the time prescribed by law.

Three things are requisite to establish a valid placer mining location in Alaska: (1) The location and marking of the boundaries so that they can be readily traced; (2) the discovery of gold in sufficient quantity to warrant the further expenditure of time and money in the development of the claim; and (3) recordation of the notice of location. When these three things are done the locator then has a perfect title to the claim as against all the world except the United States.

All these things were done by the defendants in error, and they had at the time of the location of Bench Claim No. 6, First Tier, Right Limit, on Dome Creek, by the plaintiffs in error, on May 12, 1904, a perfect title to Creek Claim No. 6.

It is admitted in the opening brief for the plaintiffs in error that "the law seems to be clearly settled that "where a mining claim is located in excess of the stat- "utory area in good faith and injures no one at the "time it is made, it is void only as to the excess."

Lindley on Mines, Sec. 362;
Snyder on Mines, Sec. 398;
English vs. *Johnson,* 17 Cal., 108-117;
Howeth vs. *Sullenger,* 113 Cal., 547;
Thompson vs. *Spray,* 72 Cal., 528;

Jupiter Mining Co. vs. *Bodie Con. M. Co.,* 11 Fed., 666.

Patterson vs. *Hitchcock,* 3 Colo., 533;

Taylor vs. *Parenteau,* 48 Pac., 505;

Hanson vs. *Fletcher,* 37 Pac., 481;

McPherson vs. *Julius,* 95 N. W., 428-435;

McElliott vs. *Keogh,* 90 Pac., 823-5.

Counsel for the plaintiffs in error generously abandon the contention that the rule laid down in Montana —that where a claim is located and the outlying boundaries indicate a location in excess of the statutory area, not the excess alone, but the whole location, is void— is the general law, and admit that the sound rule is that the excess alone is void. For this generosity on their part we are duly grateful.

The contention of counsel for the plaintiffs in error, on pages 38 and 39 of their brief, would be very ingenious although not convincing, if their assertion that the location notice claimed 1320 feet upstream and 330 feet on each side of the initial stake, were correct; but, unfortunately for that contention, the wording of that location notice was one of the disputed points in the testimony that was resolved by the trial judge in favor of the contentions of the defendants in error; therefore, their argument is not within the facts found by the Court.

The location of a mining claim by mistake for more than the 200 feet on the vein allowed by the United States Statutes and the local laws of the mining district

is not necessarily void as to the whole, but the excess may be rejected and the claim held good as to the remainder unless it interferes with rights previously acquired.

Richmond Min. Co. vs. *Rose etc.,* 114 U. S., 576;
McIntosh et al. vs. *Price et al.,* 121 Fed., 716.

Again, where a location otherwise valid exceeds the width allowed by law, it is void as to the excess but valid as to the extent allowed by law.

Jupiter M. Co. vs. *Bodie Con. M. Co.,* 11 Fed., 666;
McIntosh et al. vs. *Price et al., supra.*

The defendants in error having a perfect title to their claim in 1904, the plaintiffs in error were trespassers on the portion of the claim in dispute, as the excess had not been determined. If the plaintiffs in error had the right to relocate a strip along the north side of the claim belonging to the defendants in error, there would be no reason why they could not locate a strip of land equal to the excess through the center of the claim and cut out the shafts which the defendants in error had sunk and thereby deprive them of their discovery of gold and further deprive them of their title to the whole claim.

How, then, should the excess of the location be determined, and from what portion of the claim should

it be cut? That is the question which this Court has to decide.

It will be remembered that in the testimony, the defendants in error located their initial post at the point marked "H" on Exhibit B; that they then located their initial post on the lower end of the claim at the point marked "E"; following this, the posts on the upper corners marked "B" and "G," respectively, were located, and afterwards the lower right hand corner post at the point marked "A" was located, leaving three corner posts and the end posts definitely fixed. The defendants in error then proceeded to locate the fourth and last corner of their claim at the point marked "F" on Exhibit B, and then made the mistake of traveling too far from "A" to "F," and in locating that line began to take in more land than the law allowed; in other words, began locating the excess of their claim. Immediately upon discovering that their claim was in excess of what the law allowed, they shortened this last line and drew in their lower left hand post, thereby eliminating such excess. The good faith of the defendants in error was further shown by their offer to convey to the plaintiffs in error a strip of land about 88 feet wide running along the east end of Creek Claim No. 6, which would have included the shaft sunk by the plaintiffs in error.

The United States Statutes provide that the form of a claim shall, as near as possible, conform to the United States system of surveys, and that as the initial stake

on the claim of defendants in error bore notice calling for 1320 feet by 660 feet, which is a subdivision of the system of surveys and a rectangular parallelogram, the defendants in error conformed to that rule, and when the excess was abandoned by them it left their location almost an ideal one, viz., that of a rectangular parallelogram.

A second locator cannot enter within the boundaries of a placer mining claim as staked by a prior locator and make a valid location on ground of which the first locator is in actaul possession and on which he is engaged in work, upon the ground that the first claim as staked exceeded the width prescribed by the local rules and regulations. The owner is entitled to select the portion which he will hold and to draw in his lines, and cannot be ousted from the portion he was engaged in working by a second locator thereon. This proposition seems to have been thoroughly discussed in the case of *McIntosh et al.* vs. *Price et al., supra,* and the facts in that case seem to counsel for the defendants in error to be on all fours with the facts in this, although counsel for the plaintiffs in error, in their anxiety to evade this decision, make a vain effort to distinguish it from the case at bar, and lay special stress upon what they claim to be an important point in their favor, viz., that the defendants in error were not in the physical possession of the land in controversy in the year 1904 when the plaintiffs in error located their bench claim overlapping the creek claim of the de-

fendants in error. But it is earnestly contended by defendants in error that inasmuch as they had completed all three requirements of the law relating to the location of placer mining claims in Alaska, and had acquired a perfect title as against all persons except the United States, it was not necessary for them to be in actual physical possession in order to protect their rights, as might be the case, for instance, if the defendants in error had not at that time made their discovery, or had not recorded their notice of location, or had not completed the staking out of the claim.

Considerable stress is also laid by counsel for plaintiffs in error upon the expression used in the case of

Richmond Min. Co. vs. *Rose,* 114 U. S., 576,

wherein the Court, in its decision, states:

> "We can see no reason in justice or in the nature of the transaction why the excess may not be rejected and the claim be held good for the remainder *unless it interferes with rights previously acquired,* the plaintiffs in error claiming that they had rights 'previously acquired'—i. e., acquired previous to the date of the rejection of the excess of the location by the defendants in error."

Discussing this particular expression, this Court, in the case of *McIntosh et al.* vs. *Price et al., supra,* says:

> "Rights previously acquired, so referred to, mean rights acquired prior to the time when the rights of the plaintiffs were initiated."

There is no question, and can be none, but that the rights of the defendants in error in this case were not only initiated two years prior to the location by the plaintiffs in error, but were absolutely established by a perfect title at least one year prior to such location by the plaintiffs in error. We believe that the case just cited is absolutely conclusive on that point.

Answering the contentions of counsel on the other side touching the various assignments of error relating to the findings of fact by the court below, we respectfully submit that there is ample evidence to warrant the findings made by the Court.

The findings of the Court upon the facts stand as the verdict of a jury when reviewed in an appellate court.

> *McIntosh et al.* vs. *Price et al., supra;*
> *Empire State-Idaho M. & D. Co.* vs. *Bunker Hill, etc.,* 114 Fed., 417.

Answering the argument of counsel for plaintiffs in error touching Assignment of Error No. 14, to the effect that defendants in error had failed to file with the recorder of the Fairbanks Recording District a proper notice of location, in that the same had no reference to natural objects or permanent monuments, we believe that the location notice comes clearly within the rule laid down in the case of *McIntyre et al.* vs. *Price et al., supra,* to the effect that a locator of a placer mining claim sufficiently complied with the law as to markings where he designates the boundaries by

reference to the corner of a prior claim, where he placed a substantial stake monument, and by placing at each of the other corners and at the center of each end line substantial stakes so that the boundaries could be readily traced.

See also:

Meydenbauer vs. *Stevens,* 78 Fed., 787;
McKinley Creek M. Co. vs. *Alaska United M. Co.,* 183 Sup. Ct., 563.

The evidence throughout the trial shows, and the trial court found as a fact, that the end and corner stakes were clearly marked, and that they had reference to the corner posts of the claims both up and down stream from the one in question.

It is respectfully submitted that this appeal should be dismissed and the judgment of the court below affirmed.

CLAYPOOL, KELLUM & COWLES, AND
FERNAND DE JOURNEL,
Attorneys for Defendants in Error.

T. C. WEST,
Of Counsel.

No. 1455

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN DISTRICT OF CALIFORNIA

A. ZIMMERMAN, ED. WURZBACHER, ROY FAIRBANKS, and ANDREW JACK,

Plaintiffs in Error,

vs.

JAMES FUNCHION and AMY SALE,

Defendants in Error.

Oral Argument of W. H. Metson, Esq., on Behalf of Plaintiffs in Error.

PRESS OF THE JAMES H. BARRY CO.
213-214 LEAVENWORTH ST.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN DISTRICT OF CALIFORNIA.

A. ZIMMERMAN, ED WURZBACHER, ROY FAIRBANKS, AND ANDREW JACK,
Plaintiffs in Error,
vs.
JAMES FUNCHION AND AMY SALE,
Defendants in Error.
No. 1455.

Oral Argument of W. H. Metson, Esq., on Behalf of Plaintiffs in Error.

MR. METSON—May it please the Court, the controversy in this case is between a creek claim called No. 6 Above Discovery on Dome Creek (Dome Creek flows from east to west) and a bench claim which was intended to be located northerly of and parallel to this Dome Creek line, on the right limit thereof. This involved an overlap between the two claims of about one and three-quarters acres.

The location notice of Creek Claim No. 6 Above Discovery on Dome Creek and the marking of the same on the ground were made in September, 1902, as claimed by the defendants in error. Our location was made in May, 1904, nearly two years thereafter, by marking the ground and staking a bench claim apparently overlapping the creek claim of our opponents. The real controversy herein revolves around the sluice-box made by nature in this overlapping fraction. The hidden channel, the underground riffle, is there, and naturally we both want the gold. The creek claim was located and nothing was done by defendants thereon after the marking of the boundaries. No work was done thereon in 1903, excepting assessment work. Nor was any work done in 1904, 1905 or 1906 except assessment work.

On the contrary, we had a cabin on our bench claim from September, 1904, and were working there sinking holes and doing certain discovery work until in April, 1905, when in one of these holes, in what would be the natural ground sluice of the claim, we discovered coarse gold. Shortly after that our opponents came out and we showed them the gold that we had found in the underground riffles, a matter of very rich gravel. After having thus shown them this coarse gold, the locators of the creek claim came out later on the ground and blazed out the alleged lines of their claim, taking in our ground.

The location notice of Funchion calls for 20 acres. The testimony of defendants in error is that they went up stream and located their initial center stake by cutting off a tree and marking it as being the upper end center of No. 6 on Dome Creek. This would be at point "H" on the map, Plaintiffs' Exhibit "B." On this stake they claimed 1320 feet down stream and 660 feet wide. So *they* say. Our witnesses testified, however, that the markings on the lower center stake, point "E" on the map, were 1320 feet up stream by *330* feet on each side thereof.

Now, when we located in May, 1904, nearly two years thereafter, we found this lower center stake. We followed a trail from this center stake northerly, and after stepping off about *345* feet we found a stake with some markings thereon which were not clear, but which we understood to be the northwest corner stake of their claim, and we therefore established our location post a few feet therefrom.

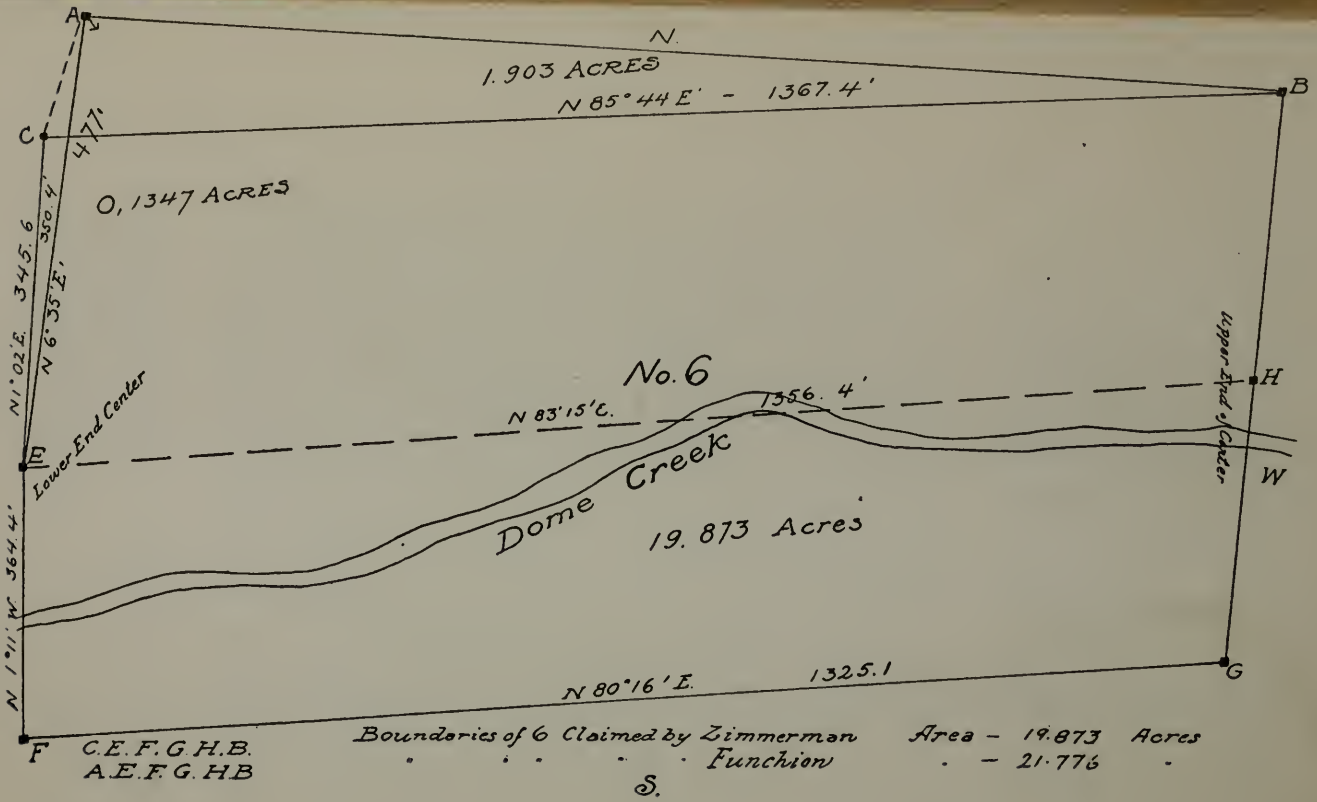
Now, when they re-marked the creek claim in 1905 after we had shown them the coarse gold that we had discovered in the ground sluice as I call it, they *then* blazed a line from this center stake to what they claim is the northwest corner of the creek claim, some *477* feet distant instead of *330* feet. This is at the place marked "A" on Plaintiffs' Exhibit "B." Now, the point in this case as I see it is this: Measuring up from this 345 foot stake and around the creek claim as shown, our opponents have an excess of one and three-quarters

acres over the twenty acres allowed by section 2331 of the Revised Statutes of the United States. Our contention is, therefore, that inasmuch as they were *not* mining on this excess, that we had a right to and did cut it off; that they have no title to this one and three-quarters acres which contain the hidden underground channel and which, by the efforts of our people we have succeeded in developing.

Immediately after making our location the record shows that our opponents were aware of the fact and continued to be aware of our claim regarding the 345 foot stake at point "C," being their northwest corner, down to the time of commencing litigation. But they did not attempt to draw in their lines so as to include this one and three-quarters acres comprising a part of our location until after they had commenced this action, when they cut off a strip on the southerly end of their claim so as to reduce their location to the proper statutory size, asserting their right to the fraction included in our claim.

We here insert a little diagram which may assist the Court in arriving at an understanding of the relative situation of these locations.

Now, your honors will observe that this triangular piece on the northerly side of the creek measured up about one and three-quarters acres. The stakes at points A and C make this clear. Measuring from the 345 foot stake to the 477 foot stake, and the distance practically makes the excess which they have excluded


A
N.
1.903 ACRES
N 85° 44 E' - 1367.4'
B
C
471'
0,1347 ACRES
N 1° 02'E. 345.6
N 6° 35'E. 350.4'
No. 6
N 83° 15'E.
1356.4'
H
E
Lower End Center
Upper End of Center
W
Dome Creek
19.873 Acres
N 1° 11' W 364.4'
N 80° 16' E. 1325.1
G
F
C.E.F.G.H.B.
A.E.F.G.H.B
Boundaries of 6 Claimed by Zimmerman Area - 19.873 Acres
" " " " Funchion " - 21.776 "
S.

at the other end, and about which this controversy arises. The court below has given our opponents the excess on which we are working. We contend this was error.

The case of *Price* vs. *McIntosh,* reported in 121 Fed., p. 716, and which was decided by this Court,, involved a somewhat analogous question, excepting that there the *facts* were vitally different. It was held by this Court in that case that where a man had made a mining location in excess of the statutory area, *and was working the excess,* had found the underground channel, *was in the actual occupancy thereof, mining it,* he could not be deprived of the particular hole in which he was working because of such excess, by reason of some subsequent locator coming along and floating or swinging over his actual workings for the purpose of grabbing the underground channel of the man who had developed it. That the original locator under these circumstances could elect what part of the excess he would throw off, and that being in the actual possession of the excess diligently working the same was a sufficient election.

But this is a dissimilar case. Here the man who innocently made this overlap (if it be one) made it upon an unoccupied location which, if valid otherwise, contained one and three-quarters acres in excess of the area allowed by law. We claim that inasmuch as there was no occupancy—our opponents being many miles off in another part of Alaska—that we had the right to take

the excess of this ground as it appeared to us from the markings on the ground.

In other words, that the burden was not on us to "mush" over that creek or throughout the district to find the man who had located the creek claim, inform him of his excessive area, and ask him to cut off his excess so that we might locate it.

Federal Courts have endeavored to so construe the law as to do equal justice between different locators, and in so doing they have naturally defended and protected that man who has found the channel and is actually working it as against some selfish person who comes along subsequently and tries to take advantage of the situation, claiming that the portion where the first locator is actually working is the excess. This is an entirely different case, as we have shown.

Still there should be some limitation, for a man might stake out 21¾ acres and hold it as against all others. Now if locations containing 21¾ acres are going to be protected by the courts, then locations of twenty-five, thirty or forty acres will have to be. Where are the courts going to draw the line in the face of section 2331? The statute says placer claims shall contain only twenty acres for each individual. Where are the courts going to draw the line as to the excessive area that may be staked off by the *non-occupant* and *non-worker,* so that he can claim the excess as in this case, after he has stood by and somebody else has found and developed the pay channel? Are they going to draw the line

against the man who acts in good faith and diligently works his claim, and strike him who has found the gold and developed the ground, rather than he who simply locates, not in conformity to the statute, but marks excessive boundaries and then goes away therefrom?

Assume this state of facts. Assume that our opponents located this ground in controversy, and then came out of Alaska and came here to California. Assume that we made our location, went ahead and developed the ground in good faith, relying upon the stake in controversy here being the other side's northwest corner (stake "C," the 345 foot stake). Then, after we had discovered the channel and developed the ground, they come back to Alaska and claim a right to the location and that they are entitled to take this excess and cut it off where they choose and say they are going to hold the channel and they will give us a portion somewhere else across their claim from ours. That would be the situation. Would that be justice? Can it be law?

On the contrary, I take it that the true rule of law is that if a party is actually in possession of such excessive area, working the ground and developing the channel, and signifies his intention of holding this ground and working it actively and energetically, he ought to be allowed, and the law does allow him, to hold it as a part of his location. On the other hand, if he does not do that, he is the loser.

Counsel has indulged in a little sarcasm at our expense in his brief, upon this question, and says that we

do not contend for the Montana rule, that we are generous, and so forth. We have presented this matter as we think and understand the law to be. We believe the consensus of authority to be that the excess is void and that the whole location is not void. Under the Montana rule, if a man located a claim that was larger than the amount allowed by law, the whole claim was void. The rule in the Federal Courts appears to be that the location is void as to the excess, and the rule in the *Price-McIntosh* case was that the man who was in the *actual* possession of the property would have the right to say what portion of the over-lap should be taken off.

However, in connection with the argument I am making, I would like to read from the case of *Hauswirth* vs. *Butcher,* which was a Montana case, and wherein the Montana doctrine was invoked. I do not contend this is not a harsh doctrine, but the reasoning of a part of the opinion is applicable to my argument here. I will read from page 716, 1 Pac. Rep.:

> "As to the length of a mining claim, there must be a substantial compliance with the law, as there must in all other respects pertaining to the location. The claim in question, as shown by the stakes and boundaries thereof, is 2000 feet in length, whereas the greatest length as authorized by law is 1500 feet. If such a location could be sustained to the extent of 1500 feet where the rights of third persons had not intervened, which we do not decide, cer-

tainly if such rights had attached such a location would not protect 500 feet in length of claim more than the law authorizes by virtue of one discovery. A 1500-foot claim cannot be shifted from one end to the other of a 2000-foot claim as circumstances might require to cover the discovery of a third person within such 2000 feet location. . . . 'The object of the law in requiring the location to be marked on the ground is to fix the claim, to prevent floating or swinging so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue. The provisions of the law designed for the attainment of this object are most important and beneficent and they ought not to be frittered away by construction.' "

It was held in that case that where a man marked a claim of 2000 feet he could not even hold 1500 feet, because the whole thing was void. And the court can readily see that if a locator is only entitled to 1500 feet, but still marks off 2000 feet, he could slide this way or that way, as the situation might disclose ore or chutes of ore might be developed in the ledge by other people, and in that manner be within the limit of 2000 feet, electing at any time to take out of it a 1500 foot claim.

So it is with a placer mining claim. If a man had 21¾ acres marked out as being available, and did not primarily declare himself and cut off the excess, then if some party comes along, takes that excess and locates

it (as we did here two years after Funchion had let his location sleep) then that party would be entitled to such excess. That is our argument on this point in the case.

There are some other circumstances with reference to our taking the 1¾ acres here. It is in evidence that after we had shown our opponent the coarse gold, which we had found, he went on the ground and effaced the markings on this stake "A," claiming it was his stake, and placed new writings on it. When we went there in 1904 we had found this lower center stake, claiming 1320 feet up stream and 330 feet on each side thereof, and after stepping off 345 feet in a northerly direction we also found the stake at point "C," mildewed and with some obscure markings on it. A month later we found the 477 foot stake at "A," on which was a notice signed by a man by the name of McQuillan, and also markings indicating that it was the corner of Bench Claim No. 5 Below. Now, then, this stake "A" is the stake that our opponent, after finding we had made a "strike," decided was his, claimed his writings had become obliterated, effaced the writings thereon, and marked it as his northwest corner stake. But inasmuch as he marked his boundaries 1¾ acres in excess, it seems to me that the court below should have taken that into consideration. However, it did not, and we are here relying upon the law as to what a court may or will do with reference to this excess.

In closing I would like to say a word or two in reference to one or two statements in the argument of counsel for the defendants in error. I certainly feel that my learned friend has been overworked, because he is mistaken in these statements.

He asserts that "the case of *Richmond* vs. *Rose* has "been cited and considerable comment made upon it in "the brief for plaintiffs in error as to one expression "used in that case, and with your Honor's permission "I will read the paragraph that they have referred "to."

We have not *even cited* the case of *Richmond* vs. *Rose* in our brief or in our opening argument, although said case is in line with our argument. That was a patent case, as we understand it, and the Supreme Court held, as we have admitted should be the correct rule of law in our briefs and here, that the fact that a locator had staked a claim in excess of the amount allowed by law did not render the claim *entirely void,* but only as to the *excessive* area. The Supreme Court further held that when patent was applied for on such a location, the Government would exclude the excess, issuing a patent for the balance of the location. The facts of that case were entirely different from the circumstances of this case, for there the element of occupation and mining on the excess by either party was not shown and did not enter into a determination of the case.

Again counsel says in his brief (page 4), and repeats in his argument to this Court now, referring to

the testimony of Hatton, witness for plaintiffs in error, that after the conclusion of the testimony offered in the case, the court having confidence in Mr. Hatton and in Mr. Wilson, who was a witness for our opponents, and believing they both desired to tell the truth, asked them to go out and examine the stake claimed by us to be the lower right hand corner stake of the Funchion claim. Now counsel says that Mr. Hatton came back and stated he had been mistaken in his original testimony. He says (see his brief, p. 4) that Hatton, who had previously testified that said lower right hand corner stake was located at the point marked "C" on said Exhibit "B," admitted, on reporting to the Court, that he was mistaken and that such lower right hand corner stake was situated at the point claimed by the defendants in error, namely at "A" on said Exhibit "B."

I assert that counsel is mistaken also as to that. The testimony of Mr. Hatton at the trial was with reference to the marking on the *345* foot stake. Now, that was in 1904—his testimony was with reference to what he had seen there in May, 1904. The trial was in 1906, in the Fall, and he went out on the ground at that time at the request of Judge Wickersham, and when he came back he did *not* tell the Court that he was mistaken as to the lower right hand corner of the Funchion claim, as counsel state, but he told the Judge that the writing was then so dim that it was impossible to read it, and he could not, at that date, read what the writing was on the 345 foot stake. Your Honors will look at the testi-

mony in this respect, found at page 272 of the transcript.

Now, as to one other matter. My contention is that the court below made a mistake. It is immaterial what the testimony showed as to the inscription on those upper and lower center end stakes; whether one claimed 330 feet on each side thereof, and the other 660 feet wide. The same conclusion should have been reached by the court below, and should be reached by this Court, namely, that they were entitled to *but* three hundred and thirty feet on *each* side. I will read the location notice, which is one of the elements that go to mark the boundaries, and which should contain a more definite description thereof than the posted notice as has been held by this Court in the case of *Gird* vs. *California Oil Co.*, 60 Fed., p. 531.:

> "Notice is hereby given that the undersigned has located twenty acres of placer mining ground on Dome Creek in the Circle recording district, District of Alaska, described as follows: Commencing at a stake bearing location notice and adjoining No. 7 Above Discovery; thence down stream a distance of 1320 feet to a stake; thence 660 feet in width of said claim. This claim to be known as No. 6 Above Discovery on Dome Creek. Located this 18th day of September, 1902. John C. Ross, by his attorney, James Funchion" (Tr., 31).

It will be noted that the notice designates the two center stakes but no other stakes are mentioned therein.

There is a conflict in the testimony as to the stakes themselves bearing the figures 600 feet in width in accordance with the notice. Funchion, the man who located the claim, says he doesn't remember what was on the lower end stake, but that his recollection was that it was in accordance with the location notice read by Mr. Claypool. Mr. Wilson, who helped stake the claim, said he could not recollect what was on the stake. Our witnesses testified that on the lower end stake the inscription was 330 feet on each side of the stake, and Bush, their witness, testified to the same effect.

However, in my view of the law it is immaterial. In this respect I would like to call the Court's attention to the case or *Erhardt* vs. *Boaro,* 113 U. S., 528, and will read the location notice in that case, namely:

> "We, the undersigned, claim 1500 feet on this mineral bearing lode, vein or deposit. Dated June 17, 1880. Signed, Joel B. Erhardt, 4-5ths; Thomas Carroll, 1-5th."

The Court said in that case (page 533):

> "The written notice posted on the stake at the point of discovery of the lode or vein in controversy, designated by the locators as 'Hawk Lode,' declares that they claim 1500 feet on the 'lode, vein or deposit.' It thus informed all persons, subsequently seeking to excavate and open the lode or vein, that the locators claimed the whole extent along its course which the law permitted them to take. It is, indeed, indefinite in not stating the

number of feet claimed on each side of the discovery point, and must, therefore, be limited to an equal number on each side, that is, to seven hundred and fifty feet on the course of the lode or vein in each direction from that point."

Now, if the Supreme Court of the United States is right in that case, and if the contention made by counsel be true, they have all they can claim, or are entitled to under that notice; 660 feet in width is as indefinite as 1500 feet was held to be in the Colorado case (*Erhardt* vs. *Boaro*). The amount claimed by them can be but three hundred and thirty feet on each side of the center stake, and we were right in assuming the *345* foot stake to be their northwest corner stake and in making our location in accordance with such assumption.

No. 1564

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ELIZABETH DECKER,

Appellant,

vs.

THE PACIFIC COAST STEAMSHIP COMPANY,
a Corporation,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

FILMER BROS. CO., PRINT, 330 JACKSON ST., S. F., CAL.

No. 1564

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ELIZABETH DECKER,

Appellant,

vs.

THE PACIFIC COAST STEAMSHIP COMPANY, a Corporation,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

FILMER BROS. CO., PRINT, 330 JACKSON ST., S. F., CAL.

INDEX.

Index.

Index. Page

Index.

Index.

Names and Addresses of Attorneys of Record.

ELIZABETH DECKER,

Plaintiff and Appellant,

E. M. BARNES, Juneau, Alaska.

vs.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation), and JOHN JOHNSTON,

Defendants and Appellees,

SHACKELFORD & LYONS, Juneau, Alaska.

In the District Court for Alaska, Division No. 1, at Juneau.

No. 477-A.

ELIZABETH DECKER,

vs.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation), et al.

Praecipe for Transcript of Record.

To C. C. Page, Clerk of the above-named court.

Dear Sir: Will you please send to the Clerk of the U. S. Circuit Court of Appeals for the 9th Circuit at San Francisco, Calif., in the above-entitled suit, copies of the following files in said suit.

This *precipe*

1 Complaint

2 Summons

3 Demands for default

~~4 Default of *deft* Johnstone~~
5 Answer
6 Replication
7 Memorandum of decision
8 Findings requested by *plff*
9 Proposed additional findings
10 Findings of fact and conclusions of law
11 Judgement
12 Order of *Jany* 11th, 1907, extending time for filing bill of exceptions
13 Sam*d* order dated June 24, 1907
14 Same order dated *Oct* 1st, 1907.
15 Bill of exceptions
16 Assignment of errors
17 Petition for appeal
18 Order allowing appeal
19 Notice of appeal
20 Bond on appeal
21 Citation

Respectfully,

E. M. BARNES,

Attorney for plaintiff.

(Indorsed.) No. 477-A. In the District Court for Alaska, Division No. 1, at Juneau. Elizabeth Decker, plaintiff, vs. Pacific Coast Steamship Co., et al, Defendant. *Precipe.* E. M. Barnes, attorney for

Office: Juneau, Alaska, rooms 1 and 2 Valentine Building. Filed *Jan* 9, 1908. C. C. Page, Clerk, by R. E. Robertson, Asst.

In the United States District Court in and for the District of Alaska Division No. 1, at Juneau.

ELIZABETH DECKER,

vs.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation) and JOHN JOHNSTON.

Complaint to Abate a Private Nuisance.

And now comes *plff* and for cause of action against *defts* alleges:

I.

That *deft* John Johnston is equally *intereste* with *pllf* herein but refuses to join with *plff* herein; therefore she makes him a *deft* herein.

II.

That said *deft* Pacific Coast Steamship Co. is a corporation duly incorporated, and doing business in Alaska under and by virtue of the laws thereof, and at all the times herein named has so been.

III.

That at all said times *plff* and said John Johnston and his grantors have been and now are the owners in fee simple of block L. of the Town of Juneau, Alaska, according to the recorded map or plat thereof, of record in the Recorder*s* office at Juneau, Alaska.

IV.

That said premises abut*t* on the waters of Gastineaux Channel at mean high tide, and against which premises the tide regularly ebbs and flows twice in twenty-four hours.

V.

That in front of said premises and between said premises and deep water the *deft* corporation now maintains and for more than two years last passed has maintained buildings and a wharf.

VI.

That to continue to maintain said buildings and said wharf said *deft will, to plffs* irreparrible damage unless said buildings and wharf are abated by this Honorable Court.

VII.

That by the erection and maint*ain*ence of said buildings and said wharf by said *deft* corporation as aforesaid *plff* and her cotenant have been during all of said time, and now are and will continue to be during the maint*ain*ence of said wharf and buildings as aforesaid, by said *deft* corporation, as aforesaid, deprived of their right, and prevented from wharfing out or maintaining a wharf in front of their said premises, and prevented from access to deep water or at all from their abutting premises herein above described, which is a private, direct, irreparrible and material damage to this *plff* and her said cotenant, and they thereby have been now damaged in the sum of one thousand *D*ollars.

VIII.

That the said maint*ain*ence of said wharf and buildings by said *deft* corporation as aforesaid is a private nuisance to *plff* and her said cotenant.

IX.

That said buildings are known as the Union Iron

Works and the said wharf is between them and the deep water above named.

X.

Wherefore *plff* prays judgement against said *deft* corporation for herself and her said cotenant in the sum of one thousand dollars, and for her costs and disbursements and that said buildings and wharf be declared to be a private nuisance to *plff* and her cotenant, and that the same be abated.

E. M. BARNES
Atty for Plaintiff.

United States of America,
District of Alaska,—ss.

I, Elizabeth Decker being first duly sworn on oath say: That I am the *Plff* in the above entitled action; that I have read the foregoing and know the contents thereof, and believe the same to be true;

~~(Signed)~~ ELIZABETH DECKER.

Subscribed and sworn to before me this 14th day of *Sept* 1905.

[Notarial Seal]

~~(Signed)~~ L. B. FRANCIS,
Notary Public for Alaska.

[Endorsed]: No. 477-A. In the United States District Court for the District of Alaska, Division No. 1. Elizabeth Decker Plaintiff vs. Pacific Coast Steamship Co., et al., Defendants. Complaint to Abate a Private Nuisance Filed *Sep* 15, 1905. C. C. Page, Clerk, J. J. Clarke, Deputy. E. M. Barnes Attorney for *Plff* Office: Juneau, Alaska, Valentine Bldg.

In the United States District Court for the District of Alaska, Division No. 1.

No. 477-A.

ELIZABETH DECKER,

Plaintiff,

vs.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation),

Defendant

Summons on Complaint.

To Pacific Coast Steamship Co., a Corporation, and John Johnston *Defendant*— Greeting:

In the Name of the United States of America. You are hereby commanded to be and appear in the above entitled Court, holden at Juneau in said Division of said District, and answer the complaint filed against you in the above entitled action within thirty days from the date of the service of this summons and a copy of the said complaint upon you, and if you fail so to appear and answer, for want thereof the plaintiff will take judgment against you for the sum specified will apply to the Court for the relief demanded in said complaint, direct *Jmt* against *deft* corporation for $1000 damages, *plffs* costs and disbursements and abatement of a private nuisance a copy of which is served herewith.

And you, the United States Marshall of Division No. 1, of the District of Alaska, or any Deputy are hereby required to make service of this summons

upon the said defendant and each of them as by law required and you will make due return hereof to the Clerk of the Court within forty days from the date of delivery to you with an indorsement hereon of your doings in the premises.

In Witness whereof I have hereunto set my hand and affixed the Seal of the above Court this 15th day of Sept. A. D., 1905.

(Court Seal)

C. C. PAGE,
Clerk.
By J. J. Clarke,
Deputy.

United States of America,
Dist. of Alaska, Div. No. 1,—ss.

I hereby certify that I received the within Summons on Sept. 15, 1905, and served the same on Sept. 16, 1905, on the within named Deft. The Pacific Coast Steamship Company, a corporation, by delivering a copy thereof, together with a copy of the complaint in said action, prepared and certified by E. M. Barnes, Atty. for the within named plff., to W. F. Swan, (personally and in person), agent of the said Pacific Coast Steamship Co., a corp. I further certify that the President or other head of the corporation, secretary, cashier, or managing agent, of the said corporation do not reside or have an office within this First Division, District of Alaska. I further certify that I was directed by E. M. Barnes, Esq., atty. for Plff. herein to serve this Summons upon the said W. F. Swan, as agent of the said Deft. Company.

I further certify that I, at the same time and place, further served the said summons, by delivering a copy thereof, together with a copy of the complaint in said action prepared and certified by E. M. Barnes, Atty. for Plff. to the within named Deft. John Johnston, personally and in person.

Dated Juneau, Alaska, Sept. 18, 1905.

Marshal's Costs, $6. Pd. by Plff.

JAMES M. SHOUP,
U. S. Marshal.
By J. B. Heyburn,
Deputy.

[Endorsed]: No. 477-A. In the District Court of the United States for the District of Alaska, Division No. 1. Elizabeth Decker vs. Pacific Coast Steamship Co., a Corporation et al Summons. Filed *Sep.* 18, 1905. C. C. Page, Clerk, By J. J. Clarke, Deputy Clerk.

District Court for the District of Alaska, Division No. 1, At Juneau.

No. 477.

ELIZABETH DECKER

vs.

THE PACIFIC COAST STEAMSHIP CO. (a Corporation), and JOHN JOHNSTON.

Plaintiff's Demand for Entry of Default of Defendant John Johnston.

Whereas in the above cause the *deft* John Johnston has been regularly served with summons, and

Whereas the time for answering the same has fully expired and whereas the time for answering the same has not been extended by this Court or the Judge thereof and

Whereas the said defendant John Johnston has wholly failed to appear or answer said complaint—

Now therefore comes the *plff* and files this application in writing for the entry of the default of the defendant herein.

~~(Signed.)~~ E. M. BARNES,
Atty for plff.

[Endorsed]: No. 477. District Court, For the District of Alaska. Division No. 1. at Juneau Elizabeth Decker Plaintiff vs. The Pacific Coast steamship Co. and John Johnston Defendants Demand for default. Filed Dec. 8, 1905. C. C. Page Clerk, By D. C. Abrams Deputy. E. M. Barnes Attorney for *Plff*. office: Juneau, Alaska, Valentine Bldg.

In the District Court for the District of Alaska, Division No. 1, At Juneau.

No. 477-A.

ELIZABETH DECKER,
Plaintiff,
v.
PACIFIC COAST STEAMSHIP COMPANY (a Corporation), and JOHN JOHNSTON,
Defendants.

Answer of Pacific Coast Steamship Co.

Comes now the Pacific Coast Steamship Company, a corporation, one of the defendants above named,

and answering the complaint of the plaintiff herein admits, denies and alleges as follows:

I.

Referring to the allegations in paragraph 1 in plaintiff's complaint, defendant has not sufficient information on which to form a belief as to the truth and verity of the matters therein set out and therefore denies each and every allegation therein contained.

II.

Referring to the allegation in paragraph 2 of plaintiff's complaint, admits the same.

III.

Referring to the allegations in paragraph 3 of plaintiff's complaint, admits that the plaintiff Elizabeth Decker and her predecessors in interest have heretofore been part owners in block L of the town of Juneau, Alaska, but denies each and every other allegation therein contained.

IV.

Referring to the allegations in paragraph 4 of plaintiff's complaint, admits the same.

V.

Referring to the allegations in paragraph 5 of plaintiff's complaint contained, denies each and every allegation therein contained.

VI.

Referring to the allegations in paragraph 6 of plaintiff's complaint contained, denies each and every allegation therein contained.

VII.

Referring to the allegations in paragraph 7 of plaintiff's complaint, denies each and every allegation therein contained.

VIII.

Referring to the allegations in paragraph 8 of plaintiff's complaint, denies each and every allegation therein contained.

IX.

Referring to the allegations in paragraph 10 of plaintiff's complaint, admits the allegations therein contained.

And for a further and affirmative defense, defendant alleges as follows:

I.

That on and prior to the 20th day of February, 1897, one E. O. Decker and J. M. Decker were the owners of and in the possession of and entitled to the possession of block K and block L of the town of Juneau, District of Alaska and that being the owners of the said blocks on said date, February 20th, 1897, the said E. O. Decker and J. M. Decker and one Lizzie Decker, being the same identical person as the plaintiff herein, Elizabeth Decker, did by due and proper deed of conveyance convey to the Peoples Wharf Company, a corporation, all litoral and appurtenant rights by them owned, or any litoral or appurtenant rights that might thereafter exist, in and to the shore of Gastineaux Channel between the ordinary line of high tide and deep water in the town of Juneau, Alaska, except the warehouse building occupied by the said E. O. Decker and J. M. Decker; that

the said deed was only witnessed, acknowledged and thereafter filed for record on the 16th day of April, 1897, and was duly signed and executed and acknowledged by the plaintiff herein; and that thereafter, prior to April 1, 1898, the premises and rights under the said deed were duly purchased in good faith for a valuable consideration, without any notice whatever of the claim of the plaintiff or plaintiff's grantors, and in reliance upon the said deed of April 16th, 1897, by John I. Waterbury and T. Jefferson Coolidge from the Peoples Wharf Company, a corporation; and thereafter on April 1, 1898, the Pacific Coast Company, a corporation, duly purchased for a valuable consideration in good faith and without notice of any claim whatsoever of the plaintiff or her grantors the premises described in the said deed of February 20th, 1897, together with the rights therein conveyed and incident thereto.

II.

That after the purchased of the property, described in the said deed of February 20th, 1897, by the Peoples Wharf Company, the Peoples Wharf Company and their successors in interest have erected upon the said property valuable improvements in the shape of stores, shops, wharves and docks at a great expense, to-wit, considerably in excess of $30,000.00, and that all of the property, save and except the warehouse mentioned in the said deed of February 20th, 1897, lying between blocks K and L and deep water has been in the actual, notorious and exclusive possession of the Pacific Coast Company, and that plaintiff and her predecessors in interest ought to be and

are estopped from asserting any right, title or interest in or to the said premises.

III.

That the plaintiff during all of said years since the 20th of February, 1897, has stood by and allowed improvements of considerable value from time to time to be placed upon said premises; allowed the rents from the said premises to be collected by the Pacific Coast Company and its predecessors in interest, without objection, claim or notice of equity on her part to the said premises.

IV.

That the defendant herein is the lessee of the Pacific Coast Company and is not the real party in interest and has not erected the said wharf nor the Union Iron Works nor any structures upon the said premises, and does not claim the ownership of the same, but merely claims the possession of the same under its lease from the Pacific Coast Company; that the Pacific Coast Steamship Company is not the real party in interest and there is therefore a defect of parties defendant.

Wherefore, defendants pray that this action be dismissed at the plaintiff's cost and that defendants have their costs and expenses herein laid out and expended.

~~(Signed)~~ SHACKLEFORD & LYONS,
Attorneys for Defendants.

United States of America,
District of Alaska,—ss.

W. F. Swan, being first duly sworn, on oath deposes and says: I am the agent of the Pacific Coast Steamship Company, a foreign corporation; that I have read the above answer herein, know the contents thereof and that the same is true.

That I make this verification for and on behalf of the defendant corporation, for the reason that there are no other officers of said corporation now within the District of Alaska.

(Signed) W. F. SWAN,
Agent.

Subscribed and sworn to before me, this 11th day of December, 1905,

(Sealed) ~~(Signed)~~ T. R. LYONS,
Notary Public for Alaska.

Due service of a copy of the within is admitted this 11th day of Dec. 1905.

~~(Signed)~~ E. M. BARNES,
Attorney for Plff.

[Endorsed]: No. 477-A. In the United States District Court for District of Alaska, Division No. 1. Elizabeth Decker, Plaintiff, vs. Pacific Coast Steamship Co., a Corporation, and John Johnston, Defendants. Original Answer. Filed *Dec* 11, 1905. C. C. Page, Clerk, By D. C. Abrams, Deputy. Shackleford & Lyons, Attorneys for Dfts. Juneau, Alaska.

District Court for the District of Alaska, Div. No. 1, at Juneau.

No. 477-A.

ELIZABETH DECKER,

vs.

PACIFIC COAST STEAMSHIP CO. (a Corporation), and JOHN JOHNSTON.

Plaintiff's Reply to Answer of Pacific Coast Steamship Co.

And now comes *plff* and for reply to the Pacific Coast Steamship *Co's.* answer therein denies:

I.

That E. O. Decker in his lifetime or at all, or *JM.* Decker or *plf.* at any time ever did by due or proper deed or conveyance or at all convey to Peoples Wharf Co., a corporation, or any other person or at all any littoral or appurtenant rights or any part thereof then or that might thereafter exist in or to the shore of Gastineaux Channel or at all between any line of high tide or deep water or at all in the town of Juneau, Alaska, or any other place or that said Peoples Wharf Co. was or is a corporation or that any deed so conveying said property as alleged in *plffs* complaint or conveying it at all or any other property was ever *witnessed acknowledged*, signed or executed by any of said parties or filed for record at any time or that the said premises or rights or any part thereof under said deed or at all were

ever purchased *on* good faith or at all, or for any consideration or at all, or in reliance on any deed by John J. Waterbury or Jefferson Coolidge or any other person from said Peoples Wharf Co. or any other person or that the Pacific Coast Co. a corporation ever purchased or at all for any consideration or at all said property, or rights, or any part thereof without notice or at all at any time.

II.

Denies that after any purchase by any person or corporation the Peoples Wharf Co. or their successors in interest or any other person, save as is alleged in *plffs* complaint erected any wharves or dock or other improvements at any expense and alleges the nuisance complained of in *plffs* complaint does not exceed the sum of $1500.00.

III.

Denies that the *deft* is not the real party in interest in maintaining said nuisance or that there is any defect of parties or at all.

And further answering *plff* alleges.

I.

That at the time mentioned in *defts* answer to wit Feb. 20th, 1887, the said real property mentioned in *defts* answer was and at all the *time* previous, since Alaska was acquired by the United States had been and up to the 5th day of Oct. 1898 remained exclusively the property of the United States of America and was not owned by private persons or subjects to private ownership.

II.

That at no time until the past year was *plff* informed of or knew of any of her rights herein, that she is a woman who had relied at all times on the advice of hired counsel and none of them until the past year ever informed her of any of her rights herein and previous to said time she had at almost all times since her majority been a housewife and knew nothing of business or business methods.

Wherefore *plff* prays the prayer of her complaint herein be granted.

~~(Signed)~~ E. M. BARNES,
Att'y for Plff.

United States of America,
District of Alaska,—ss.

I, Elizabeth Decker being first duly sworn on oath say: That I am the *Plff* in the above-entitled action; that I have read the foregoing replication and know the contents thereof, and believe the same to be true;

~~(Signed)~~ ELIZABETH DECKER.

Subscribed and sworn before me this 16 day of Dec. 1905.

[Court Seal]

~~(Signed)~~ D. C. ABRAMS,
Deputy Clerk District Court for Division No. 1, Alaska.

[Endorsed]: No. 477-A. District Court for the District of Alaska, Division No. 1, at Juneau. Elizabeth Decker, Plaintiff, vs. Pacific Coast Steamship *Co* et al., Defendants. Replication. Filed *Dec*

16, 1905. C. C. Page, Clerk. By D. C. Abrams, Deputy. E. M. Barnes, Attorney for *Plff* Office: Juneau, Alaska. Valentine Bldg.

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 477-A.

ELIZABETH DECKER,

Plaintiff,

vs.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation), and JOHN JOHNSTON,

Defendants.

Opinion of District Court.

ON THE MERITS.

Mr. E. M. BARNES, For the Plaintiff.

Messrs. SHACKLEFORD & LYONS, For the Defendant Pacific Coast Steamship Company.

No Appearance for Defendant Johnston.

GUNNISON, District Judge.

Opinion:—Elizabeth Decker, the plaintiff herein, brings this action against the Pacific Coast Steamship Company to abate an alleged priviate nuisance which the plaintiff asserts has been maintained by the defendant company for two years or more prior to and at the time of the commencement of the suit. She aska damages in the sum of $1000.00. The defendant Johnston is the joint owner with the plaintiff of Block "L" of the Town of Juneau, and is

made a defendant in this action, he having refused to join as a plaintiff. Plaintiff and defendants seem to agree generally as to the facts in the case, with one exception, and that is as to whether or not, on February 20, 1897, Blocks "K" and "L" abutted upon the line of ordinary high tide, plaintiff contending that, by the deed, Defendants' Exhibit "A," itself, the contention is settled, because it is there recited,—"Lots "K" and "L," the same abutting on Franklin Street in said City, the said street running along the line of ordinary high tide, being the shore of Gastineau Channel in the said Town of Juneau." The evidence adduced on the trial shows that Blocks "K" and "L" did abut upon the tide land. Nor does the recital in the deed as quoted above negative such a conclusion.

On October 13, 1893, the entry of the townsite of Juneau was duly made by direction of the Secretary of the Interior, under a public survey by G. W. Garside. Blocks "K" and "L" were laid out by Garside within the boundaries of the town. At that time, Edward O. Decker and J. M. Decker were holding the land by right of possession, and they continued to so hold it until October 1, 1898, when deeds passed to them from the Townsite Trustee, Thomas R. Lyons. Subsequent to the entry, but prior to receiving the deeds from the Trustee, and on February 20, 1897, Edward O. Decker and J. M. Decker, together with the plaintiff, then the wife of Edward O. Decker, joined in a deed to the Peoples Wharf Company, a corporation organized under the laws of

Oregon, by which the three "remised, released and forever quitclaimed to the Company, in the following language:

"The right, title, interest and estate, legal or equitable, of the party of the first part, in and to the shores of Gastineau Channel, which we may now or may hereafter possess by virtue of any law of the United States or otherwise, by reason of our now being the owners of Blocks 'K' and 'L,' the same abutting upon Franklin Street of said City, the said street running along the line of ordinary high tide, being the shore line of Gastineau Channel, in the Town of Juneau, and we do, as such owners, grant to said party of the first part, and forever quitclaim to them all littoral and riparian rights appurtenant thereto, if any, that we may now have or that may hereafter exist by any cause whatsoever in our favor, our heirs, administrators or assigns.

"And we do further hereby grant to the party of the first part the right to wharf out from our said premises southwesterly to deep water, and to maintain wharves and warehouses thereon for the *benfit* of trade and commerce, and to own and occupy the same forever, by itself, its successors and assigns, except the building occupied by us, and the land upon which said warehouse is situated."

The interest there conveyed passed by certain mesne conveyances, which are in evidence, to the Pacific Coast Company, which is the lessor of the Pacific Coast Steamship Company, this defendant. Prior to the execution of that lease, the structures alleged

to be the nuisance were erected upon the tide lands in front of Blocks "K" and "L."

The plaintiff, who, with the defendant John Johnston, now owns Block "L," *derains* her title through Edward O. Decker, her deceased husband. It is alleged by plaintiff and admitted by the defendant that Block "L" abuts upon the tide land of Gastineau Channel. The evidence nowhere discloses any change in the relative position of Block "L" and the tide land between the time of the giving of the deed and the commencement of this suit.

There are in the case three questions, any one of which is decisive:

First. Is or is not the Pacific Coast Steamship Company the real party in interest? If it be merely the lessee, can this suit be maintained against it? The evidence discloses that the Pacific Coast Steamship Company is the lessee, and that the Pacific Coast Company is the owner.

It is a well-settled rule of law that whenever a nuisance exists upon the premises at the time of letting, the landlord by letting the premises in such condition, consents to the continuence of the nuisance, and is liable to all injuries to third persons from its continuence by the tenant. To state the converse of the rule, a tenant is not liable for a nuisance created by his landlord and not by himself. My conclusion is that the Pacific Coast Steamship Company is not the real party in interest, and that the suit should be dismissed.

As to second question in the case, that is, as to whether or not the deed of February 20, 1897 can be

held to convey the rights of plaintiff to the tide land, we are of the opinion that the Deckers at that time were the owners of the abutting upland, as against all *person* save the United States, and that they consequently were the owners of the littoral right, or the right of access to deep water. The plaintiff contends that this right is an appurtenance to the land, in other words, an incorporeal hereditament, and as such runs with the land and cannot be severed from it. We cannot agree with him upon this proposition. We cannot see that the cases cited sustain it. Were that contention true, the granting by the Government of the United States of a patent to abutting uplands would carry with it the absolute right to the tide land. This, however, is not the fact, for the tide lands are held by the Federal Government for the benefit of the future state, to be dealt with by the State as it sees fit; and, under the cases cited by plaintiff, the various states taking title to the tide lands in this way have seen fit to grant the tide lands to strangers, separate and apart from the upland holdings. The holder of abutting tide lands has what is termed a littoral right, that is, a right of ingress and egress to the deep water over the tide lands abutting upon this property, and the same is true of a patentee of the United States, subject, of course, to the control of the future state. That the holder by possessory title or a patent may exercise that right, or give the right to some other, is beyond question, and has been so held in repeated instances. It was clearly the intention of the Deckers at the

time of the execution of the deed of February 20, 1897, to release to the Peop*l*es Wharf Company their rights of ingress and egress over the tide lands abutting upon their property. In the opinion of the Court, the quitclaim deed effectually *convey* any right which they then held as possessory owners, or which they might thereafter acquire as patentee of those premises from the United States. It is therefore apparent that, against either of these contentions, plaintiff cannot succeed, and the action should be dismissed. It also appears to the Court that plaintiff, even though she had not effectually transferred those rights which were attempted to be transferred by the deed, cannot at this late day be heard to object to the action of her grantees under, and relying upon, that deed in the construction of wharves and other structures which took place under her very eyes. A person seeking redress of the character which she here seeks, should be, and is, in the opinion of the Court, estopped from questioning these acts after the long lapse of time, especially when she does not plead as an excuse for her lack of diligence fraud or misrepresentation on the part of the defendant.

Our conclusion is, therefore, that the suit should be dismissed.

Dated at Juneau, this 31'' day of December, 1906.

~~(Signed)~~ ROYAL A. GUNNISON,
District Judge.

[Endorsed]: No. 477-A. In the Dis*r*tict Court for the District of Alaska, Division No. 1. Eliza-

beth Decker, Plff. vs. Pacific Coast S. S. Co. et al., *Defts* Memo. of Decision. Original. Filed *Jan* 5, 1907. C. C. Page, Clerk. By J. E. Brooks, Asst.

District Court for the District of Alaska, Division No. 1, at Juneau.

No. 477-A.

ELIZABETH DECKER,

vs.

THE PACIFIC COAST STEAMSHIP CO. (a Corporation), and JOHN JOHNSTON.

Plaintiff's Proposed Findings of Fact and Conclusions of Law.

The Court finds as facts.

I.

That the *plff* is the identical person described in the decree of distribution wherein the property described in the complaint was distributed to her by decree of the Probate court of District of Alaska, Div. No. 1, Juneau precinct. Refused R. A. G.

That *plff* introduced in evidence the trustees deed of the City of Juneau conveying the property in *plff's* complaint to *plff's* grantors and from *plff's* grantors to plff. Refused R. A. G.

II.

That said premises abutt on the waters of Gastineaux Channel at mean high tide, and against which the tide regularly ebbs and flows twice in twenty-four hours. Refused as already found. R. A. G.

III.

That in front of said premises and between said premises and deep water the deft., The Pacific Coast Steamship Co., a corporation, now maintains and for more than two years last passed has maintained a building and wharf. Refused R. A. G.

IV.

That deft., The Pacific Coast Steamhsip Co., a corporation, will continue so to maintain such building and wharf unless prevented by this Court and thereby cause plff. irreparable damage. Refused R. A. G.

V.

That the said buildings are known as the Union Iron Works. Granted. R. A. G.

VI.

That by said acts the Deft., The Pacific Coast Steamship Co., a corporation, has damaged plff. in the sum of ——— dollars. Refused. R. A. G.

VII.

That the deft. John Johnston has failed to appear in this suit. Refused as already *already* given. R. A. G.

And as conclusions of law the Court finds

I.

That the default of the deft. John Johnston has been duly entered and that he is entitled to nothing by this suit. Granted. R. A. G.

II.

That the plff. is the owner of the premises described in *plff's* complaint. Refused. R. A. G.

III.

That plff. is entitled to wharf out in front of the said premises to deep water. Refused. R. A. G.

IV.

That the occupation of said premises by said deft., The Pacific Coast Steamship Co., a corporation, constitutes a private nuisance to this plff. Refused. R. A. G.

V.

That plff. is entitled to have said nuisance abated. Refused. R. A. G.

VI.

That plff. is entitled to damages in the sum of ——— dollars and her costs and disbursements herein expended. Refused. R. A. G.

———————,

Judge.

[Endorsed]: No. 477-A. District Court for the District of Alaska, Division No. 1, at Juneau. Elizabeth Decker, Plaintiff, vs. The Pacific Coast Steamship Co., a Corporation, and John Johnston, Defendants. Findings Filed Jan. 9, 1907. C. C. Page, Clerk. By J. E. Brooks, Asst. E. M. Barnes, Attorney for Plaintiff. Office: Juneau, Alaska.

District Court for the District of Alaska, Division No. 1, at Juneau.

No. 477.

ELIZABETH DECKER,

vs.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation), and JOHN JOHNSTON.

Plaintiff's Proposed Amendments to Findings of Fact, etc.

Plffs proposed amendments to *y*he findin*d*s of fact, in addition to her proposed findings of fact.

In finding II on line 8 between the words "land" and "abut" insert "at the time of the commencement of this suit, and add to the said finding," and on said 13th day of *Oct* 1893, there was made and filed with sa*u*id Register and receiver a map of said townsite of Juneau showing Franklin Street to be between blocks K. and L. and the meander line of said mean high tide. Refused. R. A. G.

Amend finding III to read "that on and prior to the 20th day of Feb. 1897, the *plffs* decedent was in possession of said block, the title thereto being in the U. S., and was entitled to the possession of said block, and on said "*0th* day of Feb. *1987* said decedent one J. M. Decker and Lizzie Decker the *plff* herein did by quit claim deed convey to the Peopl*es* Wharf Company, a corporation all of their right titl*ed* and interest, if any they then had, to all of their littoral and riparian rights immediately abut-

ting on Franklin Street and further quitclaimed by proper quitclaim deed to the said Peop*les* *w*harf company all of the littoral rights which they or any of them might thereafter exist to the tide lands of said Gastine*qau* Channel abutting on said Franklin Street. That thereafter, by mesne conveyance the Pacific Coast Company, a corporation acquired all of the right title and interest of said Peop*les* Wharf Company in and to all of the littoral and riparian rights granted by said deed of Feb. 20th *1987* and that said Pacific Coast Steamship Company is now and was at the time of the commencement of this suit and at all the times alleged in the complaint *was* in such possession. Refused as portion of above has already been found and portion not warranted by proof. R. A. G.

Strike out finding IV.

In finding V. between the words "1897" and "the" in line one insert and before *plff* obtained title by decree of distribution to said lots or any portion thereof" Granted. and in line IV of finding V. on page 3 of said findings change the *the* words twenty "thousand dollars" to "three thousand dollars" Refused R. A. G. and on the last and the preceding line of said finding strike out the words "Pacific Coast Company" and insert the words "*deft* and its lessors." Refused—R. A. G. Strike out the last three lines of finding VI and in place thereof add "That she has only had title to said block since Aug. 1902." Refused. In finding VII on line two thereof strike out the words "and is not the real party in interest" and

add the words "And has been such lessee since Aug. 1902." Refused. R. A. G.

_____,

Atty for plff.

[Endorsed]: No. 477 A. District Court, for the District of Alaska, Division No. 1, at Juneau. Elizabeth Decker, Plaintiff, vs. Pacific *Coast Co* etc. et. al., *Defendant.* Proposed Additional Findings. Filed Jan. 9, 1907. C. C. Page Clerk. By J. E. Brooks, Asst. E. M. Barnes, Attorney for *Plff* Office: Juneau, Alaska, Valentine Building.

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 477-A.

ELIZABETH DECKER,

Plaintiff,

vs.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation), and JOHN JOHNSTON,

Defendants.

Findings of Fact and Conclusions of Law of District Court.

Now on this day, this cause coming on to be heard on motion of attorneys for the defendant, Pacific Coast Steamship Company, for findings of fact and conclusions of law, in accordance with the written opinion heretofore rendered in this cause by this Court, and the Court being fully advised in the premises makes the following findings of fact, to wit:

I.

That the defendant, Pacific Coast Steamship Company, is a corporation, duly organized under the laws of the State of California and doing business in the District of Alaska.

II.

That the entry of the townsite of Juneau was made by the Receiver and Register of the Land Office at Sitka, Alaska, on the 13th day of October, 1893, that thereafter, to wit, on the 4th day of September, 1897, a United States patent was duly issued by the President of the United States to Thomas R. Lyons, as trustee, for the use and be*n*fit of the occupants of said townsite of Juneau; that blocks K and L are a portion of said Juneau townsite, and said blocks or parcels of land abut on the mean high tide-line of Gastineau Channel, an arm of the Pacific Ocean.

III.

That on and prior to the 20th day of February, 1897, one E. O. Decker and J. M. Decker were the owners of, and in possession of and entitled to the possession as against all parties save the United States in which the legal title then stood of blocks K and L of the Town of Juneau, in the District of Alaska, and while said E. O. Decker and said J. M. Decker were the owners of said blocks, and on the said 20th day of February, 1897, said E. O. Decker and J. M. Decker and Lizzie Decker, the then wife of said E. O. Decker who is the same person as the plaintiff herein, Elizabeth Decker, did, by due and proper deed of conveyance, quitclaim and convey to

the People's Wharf Company, a corporation, all of their littoral and riparian rights immediately abutting on said blocks K and L, except a small warehouse situate on said tide land and which is not in controversy in this action, and further by said conveyance quitclaimed by proper conveyance to the said People's Wharf Company all of the littoral or riparian rights which they, or any of them, might thereafter acquire to the tide lands of said Gastineau Channel abutting on said blocks K and L. That thereafter, by mesne conveyances, the Pacific Coast Company, a corporation, acquired all the right, title and interest of said People's Wharf Company in and to all of the littoral and riparian rights immediately in front of and abutting upon said blocks K and L, and that said Pacific Coast Company *is and now was* the owner of, in possession by its lessee the Pacific Coast Steamship Co. of and entitled to the possession as against all persons save its lessee and the United States of all of said premises at the time of the commencement of this action.

IV.

That plaintiff has no right, title or interest in or to any of the littoral or riparian rights or tide lands immediately abutting on and in front of said blocks K and L except a small portion of ground upon which a certain warehouse stands, and that said portion of ground and warehouse are not in controversy in this action.

V.

That since the said 20th day of February, 1897,

and before plaintiff obtained title by decree of distribution to said lots or any portion thereof the said People's Wharf Company, and their successors in interest, have erected upon said tide land valuable improvements in the shape of stores, shops, wharves and docks at a great expense, aggregating in an approx*iamte* sum of eighteen thousand dollars ($18,000); that all of the properties hereinbefore described in these findings of fact, save and except the warehouse mentioned in Finding No. 2, and that all of the littoral and riparian rights and tide land herein described have been in the actual, notorious and exclusive possession of the Pacific Coast Company and its grantors since the 20th day of February, 1897.

VI.

That the plaintiff herein is the widow of said E. O. Decker, and during all of the said *time* since the 20th day of February, 1897, has allowed improvements of great value from time to time to be placed upon said premises without objection, claim or notice of equity on her part to said premises.

VII.

That the defendant herein, Pacific Coast Steamship Company, is the lessee of the Pacific Coast Company, and is not the real party in interest, and has not erected any wharf or any structures upon said premises, and does not claim the ownership of the same, but merely claims the possession on the same under its lease from the Pacific Coast Company.

VIII.

That the defendant, John Johnston, has made no

appearance herein and has made no claim to the premises in controversy in this action.

As conclusions of law, based on the foregoing findings of fact, the Court finds:

That the Pacific Coast Company, which is the lessor of the defendant, the Pacific Coast Steamship Company, is as against all persons except the United States the owner of the premises described in the complaint herein, and was such owner of said premises at the commencement of the suit and at all times since the commencement thereof.

II.

That plaintiff's complaint shall be dismissed and that defendant, Pacific Coast Steamship Company, have judgment against the plaintiff for its costs and disbursements herein.

Dated this 9'' day of January, 1907.

~~(Signed)~~ ROYAL A. GUNNISON,
Judge.

Due Service of a copy of the within is admitted this 7 day of *Jany* 1907.

~~(Signed)~~ E. M. BARNES,
Attorney for *Plff*

[Endorsed]: Original. No. 477-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Elizabeth Decker, Plaintiff, vs. Pacific Coast Steamship Co. & John Johnston, Defendants. Findings of Fact & Conclusions of Law. Filed Jan. 9, 1907. C. C. Page, Clerk. By J. E.

Brooks, Asst. Shackleford & Lyons, Attorneys for Deft. P. C. S. S. Co. Office: Juneau, Alaska.

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 477-A.

ELIZABETH DECKER,

Plaintiff,

vs.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation), and JOHN JOHNSTON,

Defendants.

Judgment.

Now ~~on~~ this day this cause coming on to be heard on motion of counsel for the defendant, Pacific Coast Steamship Company, for a judgment dismissing plaintiff's complaint, and it appearing to the Court that the Court has heretofore made its findings of fact and conclusions of law herein, and it further appearing from said findings of fact and conclusions of law that the lessor of the defendant, Pacific Coast Steamship Company, is the owner of, in possession of and entitled to the possession of the premises described in the complaint herein, as against all persons except the United States, and that the said Pacific Coast Company was, at the time of the commencement of this action and long prior thereto, such owner of said premises, and that the plaintiff herein had no right, title or interest in or to said

premises, or any portion thereof, at the time of the commencement of this action.

It is now, therefore, considered, ordered and adjudged that plaintiff's complaint herein be dismissed and that defendant, Pacific Coast Steamship Company, have and recover of and from the plaintiff herein its costs and disbursements herein, taxed at dollars.

Done in open court this 11'' day of January, 1907.

ROYAL A. GUNNISON,
Judge.

[Endorsed]: Original. No. 477-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Elizabeth Decker, Plaintiff, vs. Pacific Coast Steamship Co. & John Johnston, Defendants. Judgment. Filed *Jan* 11, 1907. C. C. Page, Clerk, by J. E. Brooks, Asst. Shackelford & Lyons, Attorney for Dft. P. C. S. S. Co. Office: Juneau, Alaska.

District Court for the District of Alaska, Division No. 1, at Juneau.

No. 477—A.

ELIZABETH DECKER

vs.

THE PACIFIC COAST STEAMSHIP COMPANY (a Corporation), and JOHN JOHNSTON.

Order Extending Time for Filing and Settling Bill of Exceptions and Staying Execution During said Time.

On motiom of E. M. Barnes, *Atty.* for *plff* herein, *Lt* is ordered that *plff* have until Monday, July 1st, at 10 A. M. or as soon thereafter as counsel can be heard to settle and file her bill of exceptions herein, and that in the meantime execution herein be stayed.

Done in open court this 11th day of *Jan'y* 1907.

~~(Signed)~~ ROYAL A. GUNNISON,
Judge.

[Endorsed]: No. 477-A. District Court, for the District of Alaska, Division No. 1, at Juneau. Elizabeth Decker, Plaintiff, vs. Pacific Coast Steamship Co. et *al* Defendants. Order Extending Time for Filing Bill of Exceptions & Staying Execution. Filed *Jan* 11, 1907. C. C. Page, Clerk. By J. E. Brooks, Asst. E. M. Barnes, Attorney for *Plff* Office: Juneau, Alaska, Valentine building.

In the District Court for Alaska, Division No. 1, at Juneau.

No. 477.

ELIZABETH DECKER

vs.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation) et al.

Order Extending Time for Serving and Filing Bill of Exceptions and Staying Execution.

By consent of counsel herein it is ordered that *plff* have until Tuesday, *Oct* 1st to serve and file her bill of exceptions herein, and that in the meantime execution be stayed.

Done in open court this 24 day of June, 1907.

~~(Signed)~~ JAMES WICKERSHAM,
Judge.

O. K.—SHACKELFORD & LYONS.

[Endorsed]: No. 477-A. In the District Court for Alaska, Division No. 1, at Juneau. Elizabeth Decker, Plaintiff, vs. Pacific Coast Co., a Corporation et *al.*, Defendants. Order Extending Time for Filing Bill of Exceptions and Staying Execution, etc. E. M. Barnes, Attorney for *Plff* Office: Juneau, Alaska, Rooms 1 and 2, Valentine building. Filed *Jun* 24 1907. C. C. Page, Clerk. By R E Robertson, Asst.

In the District Court for Alaska, Division No. 1, at Juneau.

ELIZABETH DECKER

vs.

PACIFIC COAST STEAMSHIP CO.

Order Extending Time to Settle and File Bill of Exceptions, etc.

On motion of E. M. Barnes, Attorney for

It is ordered that Elizabeth Decker, the *plff* have until Monday, *Nov* 1st 1907 at 10 A. M. to settle and file the bill of exceptions herein, execution to be stayed in the meantime.

Dated *Sep* 30th 1907, at Chambers.

ROYAL A. GUNNISON,
Judge.

[Endorsed]: No. 477-A. In the District Court for Alaska, Division No. 1, at Juneau. Elizabeth Decker, Plaintiff, vs. Pacific Coast Steamship *Co* et *al,* Defendants. Order Extending Time of Filing Bill of Exceptions. Filed *Oct* 1 1907. C. C. Page, Clerk. By R. E. Robertson, Asst. E. M. Barnes, Attorney for *Plff*

In the District Court for Alaska, Division No. 1, at Juneau.

No. 477-A.

ELIZABETH DECKER,

vs.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation) and JOHN JOHNSTON,

Defts.

Plaintiff's Proposed Bill of Exceptions.

Be it remembered that at the trial of this suit the following proceedings were had,

The *deft* Johnston made default.

The *plff* was called as a witness in her own behalf and was asked:

Mr. BARNES.—Q. Mrs. Decker, I would ask you how much, if any, you have been damaged by the maintenance of those buildings on that property, by the Pacific Coast Steamship Company as described in the answer?

Mr. LYONS.—We object to the question for the reason that the damages are not properly pleaded in the complaint, and for the further reason that the witness has not shown herself qualified to testify to any damages that she has sustained by virtue of these structures. No proper foundation has been laid to justify or enable the Court to determine whether or not this witness is competent to testify as to any damages sufferred.

The COURT.—The first part of that objection I will overrule with leave to renew, and sustain the second part, that she had not qualified herself to testify on the question of damages.

Plaintiff excepts.

Plaintiff introduced in evidence the following deed.

Deed (Dated October 1, 1898), Thomas R. Lyons, as Trustee, to Jay M. Decker et al.

No. —— Trustee's Deed.

Thomas R. Lyons
to
J. M. & E. O. Decker.

This indenture made this 1st day of October in the year of our Lord one thousand eight hundred and ninety-eight, by and between Thomas R. Lyons as Trustee for the townsite of Juneau, in the Territory of Alaska, party of the first part, and Jay M. Decker and Edward O. Decker, of Juneau, in the District of Alaska, parties of the second part, witnesseth:

Whereas said party of the first part has been appointed *truste* for said townsite by the Secretary of the Interior, under the provisions of sections 11 to 15 inclusive, of the Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture laws, and for other purposes," (26 Stats. 1095), and

Whereas, pursuant to said appointment as such trustee, said party of the first part has duly qualified and entered upon the performance of his duties as such, as provided in said act and the regulations of the Secretary of the Interior, dated June 3, 1891, for his guidance, and

Whereas, on the 13th day of October, A. D. 1893, said party of the first part, as such trustee entered the tract of land upon which the townsite of Juneau is situate, being survey No. 1 of public surveys in Alaska, under said act, executed by Geo. W. Garside, United States Deputy surveyor, under instructions from the United States Marshal, ex-officio surveyor general of Alaska, bearing date of the 8th day of March, 1892, approved by said United States marshal, ex-officio surveyor general, on the 21st day of October, 1892, and

Whereas said trustee has entered said land in trust for the several use and benefit of the occupants thereof into lots, blocks, squares, streets, and alleys, and has assessed upon each of the lots in said townsite the sums of money contemplated by the instructions of the Secretary of the Interior, and

Whereas, said trustee finds that according to the true spirit and intent of said act that said parties of the second part are interested in said townsite and entitled to the premises thereon as hereinafter described, and

Whereas, said parties of the second part have paid the assessments upon said property, amounting to the sum of six dollars,

Now, therefore, said party of the first part, as such trustee, by the virtue of the power vested in and conferred upon him by the terms of said act, and in consideration of said sum, the receipt of which is hereby acknowledged, by these presents does grant, convey and confirm unto the same parties of the second part and their heirs and assigns, all the following lot,

piece and *parce* of land situate in the Town of Juneau and Territory of Alaska, described as follows, to-wit: Lot three (3) in Block "L," as per the official plat thereof, to have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, forever.

In witness whereof, said party of the first part, as such trustee, has hereunto set his hand and seal on the day and year first above written.

THOMAS R. LYONS, [Seal]
Trustee for the Townsite of Juneau, Alaska Territory.

In the presence of
F. D. KELSEY.
EDWIN SHAW.

Territory of Alaska:

Be it remembered, that on this 3d day of October, A. D. 1898, before me, a Notary Public, came Thomas R. Lyons, to me personally known to be the trustee of said townsite of Juneau, Alaska, and the identical person described in, and whose name is affixed to, the foregoing conveyance as grantor, and he acknowledges the execution of the same to be his voluntary act and deed as such *truste* for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my official seal on the day and year first above written.

[Seal] F. D. KELSEY,
Notary Public.

I. R. St.
10¢

Filed for record at the request of —— on the 4th day of October, A. D. 1898, at 3 P. M.

NORMAN E. MALCOLM,
Recorder.

United States of America,
District of Alaska,—ss.

I, the undersigned, hereby certify that the foregoing is a true, correct and complete transcript of the record, and of the whole thereof, as the same appears of record in Book 13 of trustee's deeds, on Page 139 of the records of the Juneau Recording District, District of Alaska.

Witness my hand and official seal this —— day of April, 1906.

H. H. FOLSOM,
Recorder for Juneau Recording District, Alaska,

Mr. BARNES.—I now offer for identification trustee's deed from the trustee to Jay M. Decker and Edward O. Decker, for Lots 1 and 2 in Block "L" of the Town of Juneau.

Marked for identification *"Plff's* Exhibit No. 2, Case No. 477.")

Mr. BARNES.—I offer that in evidence.

Mr. LYONS.—I object to the offer, for the reason that the answer alleges that the defendant is merely

leasing the littoral rights of the property in controversy from the Pacific Coast Company, and that allegation is not denied in the reply.

Objection overruled without prejudice to a motion to strike at the close of the evidence.

Plff's Exhibit No. 2, received in evidence, reads as follows:

Plaintiff's Exhibit No. 2.

No. —— Trustee's Deed.

Thomas R. Lyons

to

J. M. and E. O. Decker.

This indenture, made this 1st day of October, in the year of our Lord one thousand eight hundred and ninety-eight, by and between Thomas R. Lyons, as trustee for the townsite of *June,* in the Territory of Alaska, party of the first part, and Jay M. Decker and Edward O. Decker, of Juneau, in the District of Alaska, parties of the second part, witnesseth:

Whereas, said party of the first part has been appointed trustee for said townsite by the Secretary of the Interior, under the provisions of sections 11 to 15 inclusive, of the Act of Congress approved March 3, 1891, entitled, "An act to repeal timber-culture laws, and for other purposes," (26 Stats. 1095), and

Whereas, pursuant to said appointment as such trustee, said party of the first part has duly qualified and entered upon the performance of his duties as such, as provided in said act and the regulations of the Secretary of the Interior, dated June 3, 1891, for his guidance, and

Whereas, on the 13th day of October, A. D. 1893, said party of the first part, as such trustee, entered the tract of land upon which the townsite of Juneau is situate, being survey No. 1 of public surveys in Alaska, under said act, *ecuted* by Geo. W. Garside, United States Deputy Surveyor, under instructions from the United States marshal, ex-officio surveyor general of Alaska, bearing date of the eighth day of March, 1892, approved by said United States marshal, ex-officio surveyor general, on the 21st day of October, 1892, and

Whereas, said trustee has entered said land in trust for the several use and benefit of the occupants thereof, according to their respective interests, and has made a survey thereof into lots, blocks, squares, streets and alleys, and has assessed upon each of the lots in said townsite the sums of money contemplated by the intructions of the Secretary of the Interior, and

Whereas, said trustee finds that according to the true spirit and intent of said act that said parties of the second part are interested in said townsite and entitled to the premises thereon, as hereinafter described, and

Whereas, said parties of the second part have paid the assessments upon said property amounting to the sum of ninety-six dollars,

Now, therefore, said party of the first part, as such trustee, by virtue of the power vested in and conferred upon him by the terms of said act, and in consideration of said sum, the receipt of which is hereby acknowledged, by these presents does grant, convey

and confirm unto the said parties of the second part and their heirs and assigns, all the following lots, pieces and *parcel* of land situate in the Town of Juneau, the Territory of Alaska, described as follows, to-wit:

Lots One (1) and two (2) in Block "L," as per the official plat thereof.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, forever.

In witness whereof said party of the first part, as such trustee, has hereunto set his hand and seal on the day and year first above written.

THOMAS R. LYONS, [Seal]

Trustee for the Townsite of Juneau, Alaska Territory.

In the presence of

F. D. KELSEY.

EDWIN SHAW.

Territory of Alaska:

Be it remembered, that on this 3d day of October, A. D. 1898, before me, a Notary Public, came Thomas R. Lyons, to me personally known to be the trustee of said townsite of Juneau, Alaska, and the identical person described in, and whose name is affixed to, the foregoing conveyance, as grantor, and he acknowledges the execution of the same to be his voluntary act and deed as such trustee for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my official seal on the day and year first above written.

[Seal] F. D. KELSEY,
Notary Public.

Filed for record at the request of ———— on the 4th day of October, A. D. 1898, at 3 P. M.

NORMAN E. MALCOLM,
Recorder.

United States of America,
District of Alaska,—ss.

I, the undersigned, hereby certify that the foregoing is a true, correct and complete transcript of the record and of the whole thereof, as the same appears of record in Book 13 of the Trustee's Deeds, on page 138 of the records of the Juneau recording district, District of Alaska.

Witness my hand and official seal this —— day of April, 1906.

H. H. FOLSOM,
Recorder for Juneau Recording District, Alaska.

Mr. BARNES.—I offer now for identification a deed from J. M. Decker to John Johnson for an undivided half interest in Lots 1 and 2, and Lot 3, of Block "L." There is other property described in there, but I don't offer it for any purpose of proving title.

Marked for identification *"Plff's* Exhibit No. 3, Case No. 477-A.

Mr. BARNES.—I now offer it in evidence.

Mr. LYONS.—I object to the offer for the reason that the instrument or deed is incompetent, irrelevant and immaterial, in that the rights of the defendant Johnson are not in controversy at this time in this action, and for the further reason that the answer alleges that the defendant is merely a lessee of the Pacific Coast Company, and that allegation is not denied in the reply.

Objection overruled without prejudice to a motion to strike at the close of the evidence.

Plff's Exhibit No. 3, received in evidence, reads as follows:

Plaintiff's Exhibit No. 3.

This indenture, made the 11th day of January, in the year of our Lord one thousand nine hundred and four,

Between Jay M. Decker and Rosalie Decker, his wife, the parties of the first part, and Johnston, the party of the second part,

Witnesseth, that the parties of the first part, for and in consideration of the sum of One thousand seven hundred and fifty dollars (1750) gold coin of the United States to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, do by these presents, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns the following described tracts, lots or parcels of land lying and being in the city of Juneau, District of Alaska, and particularly bounded and described as follows, to wit:

An undivided one half interest in and two Lots numbered One (1) and Two (2) in Block "L" of the

Town of Juneau, District of Alaska, as per the official plat thereof; and Lot numbered (3) in Block "L" of the Town of Juneau, District of Alaska, as per the official plat thereof; and the easterly one-half of Lot numbered One (1) in Block "K" of the Town of Juneau, District of Alaska, as per the official plat thereof; and that certain lot, piece or parcel of land on the water front opposite the old Decker store building on Lot Two (2) in Block "L," said water front lot being in dimensions forty (40) by forty (40) feet more or less, in the Town of Juneau, District of Alaska, together with the improvements upon said aforedescribed lot and parcel, and all the right, title and interest in and to the above mentioned property belonging to the parties of the first part;

Together with the appurtenances to have and to hold the said premises with the appurtenances unto the said party of the second part and to his heirs and assigns, forever.

And the said parties of the first part, their heirs, executors and administrators, do by these presents covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that they the said parties of the first part, *theirs,* executors and administrators, all and singular, the said premises hereinabove conveyed, described and granted or mentioned, with the appurtenances unto the said party of the second part, his heirs and assigns, and against all and every person or persons, whomsoever, lawfully claiming or to claim the same or

any part thereof, shall and will warrant and forever defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JAY M. DECKER. [Seal]
MRS. ROSALIE DECKER. [Seal]

Signed, sealed and delivered in the presence of
L. R. GILLETTE.
O. M. GILLETTE.

United States of America,
District of Alaska,—ss.

This is to certify that on this eleventh day of January, A. D. 1904, before me the undersigned, a Notary Public in and for the State of Washington, dully commissioned and sworn, personally came J. M. Decker and Rosalie Decker, his wife, to me known to be the persons described in and who executed the within instrument, and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed, and for the uses and purposes therein mentioned.

And the said Rosalie Decker, wife of the said Jay M. Decker, upon an examination by me separate and apart from her said husband when the contents of said instrument were by me fully made known to her, and she was by me fully apprised of her rights and the effect of signing the within instrument, did freely, voluntarily, separate and apart from her said husband, acknowledge the same, acknowledging that she did, voluntarily, of her own free will, and without

the fear of or coercion from her husband, execute the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal] L. R. GILLETTE,

Notary Public for the District of Alaska, Residing at Juneau.

Filed for record at 3:45 o'clock, P. M., *Jan'y* 12th, 1904.

H. H. FOLSOM,
Recorder.

I hereby certify that the foregoing is a true, correct and complete transcript of the record, and of the whole thereof, as the same appears in Book 19 of Deeds, on page 517 of the records of the Juneau Recording District, Alaska.

Witness my hand and official seal this —— day of April, 1906.

[Seal] H. H. FOLSOM,

Recorder for Juneau Recording District, Alaska.

The recorded plat was admitted to be identical with the official plat referred to in the trustees deed.

The *plff* testified that she knew the property in question and desired to build a wharf from the upland described in *plffs* complaint to deep water, but was prevented from so doing by the obstructions maintained by *deft* as described in *plffs* complaint; had lived in Juneua since 1892, and was asked the question, "Have you some knowledge, Mrs. Decker, of the amount of freight that you would probably be

able to handle over your wharf, provided you had a wharf there?

Objected to by *deft* corporation as incompetent, irrelevant and immaterial, speculative, and not within the pleadings, and not the proper way to prove damages.

Objection sustained by the Court, and *plff* duly excepted.

Q. Do you know, generally, Mrs. Decker, from common repute and what you see in the newspapers, that the charges by these wharf companies here in Juneau are excessive?

Deft corporation objected to the question as incompetent, irrelevant and immaterial, not within the pleadings, and the answer to which would tend in no way to show how much the *plff* is damaged by the maintanence of the structure on the premises.

Objection sustained and *plff* duly excepted.

I*y* was admitted by the pleadings that *deft* corporation is a corporation as described in the complaint; that *plff* and *deft* Johnston are owners of the premises as described in the complaint; that the premises abut*t* on the waters of Gastineaux Channel, at mean high tide, and against which the tide regularly ebbs and flows twice in 24 hours as alleged in *plff's* complaint; that the buildings sought to be abated are known as the Union works as alleged in *plff's* complaint, and that the wharf sought to be removed is between said buildings and deep water as alleged in *plff's* complaint:

That the *deft* corporation maintains the said buildings and wharf as the lessee of the party who built

them as alleged in *defts* answer. It is admitted by plaintiff that she is the same person as Lizzie Decker, who with Edward O. Decker and Jay M. Decker executed the instrument purporting to convey certain property, including the tract of land in controversy in this action, to the Peoples Wharf Company, which instrument has been received in evidence herein over plaintiff's objections.

It was admitted by *plff* that all the upland described in the deeds and instruments offered in evidence by the *plff* was within the tract of land entered by the townsite trustee for townsite entries of land in Juneau, Alaska, on the 13th day of October, 1893, and that *plff* and her grantors were in possession of the land described in the deeds offerred in evidence by *plff* on October 13, 1893, the date of the Juneau townsite entry; but *plff* refuses to admit, and denies, that any littoral rights attached to the premises mentioned until the issuance to *plff* and her grantors of a patent therefor from the United States government.

The *deft* offered in evidence a deed dated April 20th, 1897, between E. O. Decker and Lizzie Decker, his wife, and Jay M. Decker, to the Peoples Wharf Company, a corporation, to the introduction of which *plff* objected as follows:

"Mr. BARNES: We object to it, if the Court please, on the ground that it is incompetent to prove title in the grantee, as Congress alone has the right to make grants below high water in any territory of the United States; this at the time being United States property; second, it appears from a perusal of the deed that Franklin street was between the land

owned by the grantors and ordinary high tide, and, therefore, the grantors had no littoral rights to grant; third, the deed is a quitclaim deed, and at the time all the land in Alaska belonged to the United States, and a quitclaim deed only conveyed the interests which the grantors possessed at the time of making the deed which was nothing; fourth, that the right to erect and maintain the wharf cannot belong to any person save the littoral proprietor, which in this case is the plaintiff. No rights to wharf out can be compared without a conveyance of the land itself. The wharf right cannot be destroyed by an attempted grant of the submerged soil to a stranger, because the riparian right is as much property and is as valuable as any right possessed by the owner of the upland. The ownership of the land is a necessary incident to the erection of a wharf. The rights of the riparian owner cannot be detached from the soil out of which they arise or to which they are incident, and therefore cannot be transferred without an actual conveyance of the soil itself. A purchaser by a quitclaim deed is not a bona fide purchaser and has no rights to the after acquired title of the grantor in a quitclaim deed, for the further reason that it is immaterial.

Objection overruled by the Court and *plff* duly excepted, and said deed so introduced was in the words and figures, as follows, to wit:

[Cut out in original:]

after acquired title of the grantor in a quitclaim deed. For the further reason that it is immaterial.

Objection overruled without prejudice to a motion to strike at the close of the case.

Deed received in evidence and marked Defendant's Exhibit "A," Case No. 477-A.

Defendant is permitted to substitute therefor certified copy. Plaintiff excepts. Defendant's Exh. "A" reads as follows.

Deed, Dated February 20, 1897—Edward O. Decker et ux. to Jay M. Decker et al.

This indenture, made this 20th day of February, in the year of our Lord one thousand eight hundred and ninety-seven, between Edward O. Decker and Lizzie Decker, his wife, and Jay M. Decker, of Juneau, Alaska, of the first part, and the Peoples Wharf Company, a corporation, of the second part, Witnesseth: That the said parties of the first part for and in consideration of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents, remise, release, and forever quitclaim unto the said party of the second part, and to their heirs and assigns all right, title, interest and estate, legal or equitable, to the party of the first part in and to the shore of Gastineaux Channel, which we may now or may hereafter possess by virtue of any law of the

United States or otherwise by reason of our now being the owners of Block K and L in the town of Juneau, as laid off and platted by G. W. Garside, and we do, as the owners of said lots, K and L., the same abutting upon Franklin Street in said city, the said street running along the line of ordinary high tide, being the shore of said Gastineaux Channel in said town of Juneau, and we do as such owners grant to the said party of the second part and forever quitclaim to them all litoral and riparian rights appurtenant thereto if any that we may now have or that may hereafter exist for any cause whatsoever in our favor, our heirs, administrators or assigns.

And we further hereby grant to the party of the second part the right to wharf out from our said premises southwesterly to deep water and maintain wharves and warehouses thereon for the benefit of trade and commerce and to own, possess and occupy the same forever by itself and its successors and assigns, except the warehouse building occupied by us and the land upon which said warehouse is situated.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

E. O. DECKER. [Seal]
J. M. DECKER. [Seal]
LIZZIE DECKER. [Seal]

Witnesses:

F. D. NOWELL.
J. F. MALONEY.

United States,
District of Alaska,—ss.

I, F. D. Nowell, a Notary Public in and for the District of Alaska, residing at Juneau, in the above-named District, duly commissioned, sworn and qualified, do hereby certify that on this 20th day of February, 1897, before me personally appeared Edward O. Decker, and Lizzie Decker, his wife, and Jay Decker, to me known to be the individuals described in and who executed the within instrument, and acknowledged to me that they signed and sealed the same as their fee and voluntary act and deed for the uses and purposes therein mentioned. And the said Lizzie Decker, wife of the said Edward O. Decker, upon an examination by me separate and apart from her said husband, when the contents of said instrument were by me fully made known to her, and she was by me fully apprised of her rights and of the effects of signing the within instrument, did fully and voluntarily separate and apart from her said husband acknowledge the same, acknowledging that she did, voluntarily, of her own free will, and without the fear of or coercion from her said husband, execute the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 20th day of February, 1897.

[Notarial Seal] F. D. NOWELL,
Notary Public in and for the District of Alaska.

Filed for record April 16th, 1907, at one o'clock P. M.

JOHN Y. OSTRANDER,
District Recorder.

Book 12, p. 208.

United States of America,
District of Alaska,—ss.

I hereby certify that the foregoing is a true, correct and complete transacript of the record and of the whole thereof, as the same appears of record in book 12 of Deeds at page 208, of the Records of the Juneau Recording District, District of Alaska.

Witness my hand and official seal this 24th day of April, 1906.

H. H. FOLSOM,
(United States Commissioner)
(Seal)
Recorder for Juneau Recording District, Alaska.

Mr. LYONS.—We now offer in evidence the Articles of Incorporation of the Peoples Wharf Company recorded in Book 10 of Deeds on page 121 of the Records of the Juneau Recording District, District of Alaska, dated 25th. of June, A. D. 1904.

Mr. BARNES.—We object to the Articles of Incorporation, if the Court please, on the ground that they are incompetent, and that at that time a corporation could not be made within the District of Alaska, and for the further reason, if the Court please, that it does not show the residence of any of the incorporators or the directors, nor does it show the By-Laws, if the Court please, what they should be, etc.,

reserving the right, if the Court please, to elaborate on this objection at the close of the case. I object to it on the ground that it is incompetent for those reasons, and, being incompetent, it is also immaterial.

Objection overruled.

Plaintiff excepts.

Mr. LYONS.—I presume the reading of this may be waived.

The COURT.—Yes.

The Articles of Incorporation received in evidence as Defendant's Exhibit "B," leave being granted by the Court to substitute a certain copy thereof, and reads as follows:

Defendant's Exhibit "B."

Whereas, Charles W. Young, Charles E. Tibbitts, Willis Thorp, and Joseph N. Harrison, of the town of Juneau, in the District of Alaska, have associated themselves together for the purposes of incorporation under the laws of the State of Oregon, they do therefore make, sign, and acknowledge these triplicate certificates in writing, which when filed, shall constitute the articles of Incorporation of "The Peoples Wharf Company.

Article I. The name of said Company shall be "The Peoples Wharf Company.

Article II. The term of existance of said Company shall be fifty years.

Article III. The objects for which said company is created are to acquire, construct and maintain wharves and warehouses and to import foreign and domestic coal and to vend the same.

Article IV. The principal office of said company shall be kept at the town of Juneau, in the District of Alaska, and the principal business of said company shall be carried on in said town of Juneau, District aforesaid.

Article V. The capital stock of said company shall be Twenty Thousand Dollars, divided into Four Thousand shares of Five Dollars each.

Article VI. The stock of said company shall be non-assessable.

Article VII. The corporators shall have power to make such prudential by-laws as they deem proper for the management of the affairs of the company, not inconsistent with the laws of the State of Oregon, for the purposes of carrying on of all kinds of business within the objects and purposes of said company.

In witness whereof the said Incorporators have hereunto set their hands and seals this 25th day of June, A. D. 1894.

CHARLES W. YOUNG. [L. S.]
CHARLES E. TIBBITTS, [L. S.]
WILLIS THORP. [L. S.]
JOSEPH W. HARRISON. [L. S.]

United States,
District of Alaska,—ss.

I, John F. Maloney, a Notary Public in and for the District of Alaska, do hereby certify that Charles W. Young, John Tibbits, Willis Thorp and Joseph W. Harrison, who are personally known to me to be the same persons described in and who executed the with-

in triplicate Articles of Incorporation, appeared before me this 25th day of June, 1894, and personally acknowledged that they signed, sealed and delivered the same as their free and voluntary act and deed.

Witness my hand and notarial seal this the 25th, day of June, 1894.

[Notarial Seal] J. F. MALONEY,
Notary Public for Alaska.

Filed for record at 15 minutes past 9 o'clock A. M. June 28th, 1894.

H. W. MELLEN,
District Recorder.

Book 10 p. 101.

United States of America,
District of Alaska,—ss.

I hereby certify that the foregoing is a true, correct and complete transcript of the record, and of the whole thereof, as the same appears of record in Book 100 of Deeds at 121 of the records of the Juneau Recording District, District of Alaska.

Witness my hand and official seal this 24th day of April, 1906.

[United States Commissioner Seal]

H. H. FOLSOM,
Recorder for Juneau Recording District, Alaska.

The *deft* corporation offerred in evidence a deed from the *Poeples* Wharf Company, a corporation, to John J. Waterbury and T. Jefferson Coolidge, Jr., to the introduction of which *plff* objected as follows:

[Crossed out in original:]

Mr. BARNES: We object.

Mr. LYONS: To make it clear, I will offer the whole Plat in evidence.

The COURT: I think that is very much better.

Mr. BARNES.—We object to this Deed because it is incompetent, if the Court please. It does not appear that The Peoples Wharf Company was a corporation and neither does it appear that any littoral rigths were owned by The Peoples Wharf Company, or could be conveyed by the Peoples Wharf Company; and neither does there appear on the Deed any authority from the corporation, if any corporation existed, to convey the property at all.

Objection overruled without prejudice to a Motion to renew it.

Plaintiff excepts.

[Crossed out in original:]

Mr. LYONS: I will state to the Court that there is other property described in the Deed, but from the fact that the Plat shows all the property, it is difficult to segregate the portions that are not material, and for that reason I offer the whole Deed and Plat as evidence, and I will ask the permission of the Court, at this time, to offer a certified copy of the Deed and a tracing of the Plat.

Mr. BARNES: We object to the offering of the Plat, if the Court please, on the ground that it cannot change the description in the Deed, if there is a Deed, that was given by the original grantors of Decker to the Peoples Wharf Company; that the map offered by them attached to the Deed from The Peoples Wharf Company to John I. Waterbury and T. Jefferson Coolidge cannot change the description of the property

Deed and Map received in evidence as Defendant's Exhibit "C," No. 477-A, which Deed reads as follows:

Defendant's Exhibit "C."

This Indenture, made this 20th day of February, one thousand eight hundred and ninety-seven by and between the Peoples Wharf Company, a corporation duly organized under the laws of the State of Oregon by the laws of the United States made applicable to the Territory of Alaska, whose principal place of business is in the City of Juneau, Territory of Alaska, the party of the first part and

John I. Waterbury of New York and T. Jefferson Coolidge, Jr., of Boston, the parties of the second part, witnesseth:

That whereas the said party of the first part is a corporation duly incorporated and existing under and by virtue of the laws of the State of Oregon and in pursuance of the statute in such cases made and provided has acquired and is the owner of a certain wharf structure, warehouses thereon situated and is the owner of the land abutting upon the shore to which said wharf structure is appurtinant,

And whereas the Board of Directors of said corporation duly assembled duly passed the following resolution:—

Resolved that the President and Secretary under their hands and seals and the seal of this Company be and they are hereby ordered and instructed to sell and convey to John I. Waterbury of New York and T. Jefferson Coolidge, Jr., of Boston, by Deed of general Warranty, all the real estate and premises and wharf property thereon situated, now owned, claimed or possessed by this Company, together with possession, possessory, littoral or riparian right now owned, claimed, exercised or possessed by this Corporation in the District of Alaska,

And whereas the stockholders of said corporation at a meeting duly called thereafter duly ratified and confirmed said action of said Board of Directors in all respects.

Now, therefore, in pursuance of said resolution aforesaid and in consideration of the sum of One Dollar and other good and valuable considerations, paid by the said party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part as grantor do remise, release, convey and confirm to the grantees their heirs, executors, administrators and assigns forever the said land, premises and appurtenances before mentioned in the District of Alaska as aforesaid, as follows: all its right, title and interest in and to the property mentioned and described in detail as follows:—

Beginning at Cor. No. 1 being North Easterly Cor. of Fisher and Tibbits old wharfsite about 1½ feet

North Easterly from the North East Cor. post of wharf whence Cor. No. 4 of the Exterior Boundary of Juneau Townsite Sur. No. 1 bears S. 29° 36′ E. 170.02 ft. dist. Thence S. 26 17 E. 126 ft. more or less to line of Piles defining the South East boundary of said wharfsite, thence along said line of piles S. 55 30 W. 440 ft. to S. W. Cor. "Peoples Wharf" in deep water, thence along the S. W. side of said wharf N. 47 00 W. 108 ft, thence N. 28 00 W. 100 ft. to Cor. shed Engine House, thence along the S. W. side Coal Bunker *bl'd* No. 14 00 W. 125 ft. thence N. 76 00 E. along the N. W. end Coal Bunker bld'g, 24 ft, to N. E. Cor. Coal Bunker bldg., thence N. 14 00 W. 352 ft., thence N. 48 30 W. 38 ft. to cor. No. 7 Sur. No. 1 Exterior boundary Survey Juneau Townsite thence along the meander line Juneau Townsite S. 83 04 E. 44 ft. thence S. 14 00 E. 368 ft. to N. W. cor, warehouse, thence N. 76 00 E. 32 ft. to N. E. Cor. warehouse, thence S. 14 00 E. 80 ft. to S. E. cor. warehouse thence S. 21 30 E. 122 ft. to N. W. side wharf thence N. 51 30 E. 130 ft. thence E. 9 ft. thence N. 51 30 E. 275 ft. to the place of beginning

Courses expressed from the true meridian magnetic Var. 30 00 East of North.

For a more particular illustration of the foregoing description reference is hereby made to the map or plat of the said premises which is hereto attached and made a part of this description and marked "A," said property hereby conveyed being marked on said map "Peoples Wharf" and extending southerly from

Seward Street to deep water, in the waters of Gastineaux Channel, and from blocks "K" and "L" southwesterly to deep water in said channel, all being used in aid of trade and commerce.

Together with all and singular the possession, possessory rights and riparian rights connected therewith and appurtenant thereto with the right to wharf, build and construct wharves and warehouses over and across the same and possess, own and use and occupy the same and all of the waters of Gastineaux Channel, on and to the westward, southward and eastward thereof as fully as now are owned, claimed or possessed by the party of the first part with the same rights of egress and ingress thereto from Seward Street, Front Street and Franklin Street as is now possessed by the party of the first part.

In witness whereof the said party of the first part by resolution of its Board of Directors ratified by its stockholders has caused these presents to be subscribed by its President and Secretary and its corporate same and seal to be hereto affixed the day and year first above written.

THE PEOPL*ES* WHARF COMPANY. [Seal]
By JOHN F. MALONEY, [Seal]
President.

[Corporate Seal] Attest.
EMERY VALENTINE, [Seal]
Secretary.

Signed, sealed and delivered in the presence of
T. J. HUMES.
EDWIN GOODALL.

United States,
District of Alaska,—ss.

Be it remembered that on this the 20th day of February, 1897, before me, F. D. Nowell, a Notary Public in and for the District of Alaska aforesaid, duly commissioned as such, personally appeared J. F. Maloney known to me to be the president, and Emery Valentine personally known to me to be the secretary of the Peoples Wharf Company, the corporation that executed the within instrument and they and each of them acknowledged to me that such corporation executed the same and that they and each of them as the President and Secretary for and on

[Continuation of foregoing paper is omitted from the original certified Transcript of Record.—Clerk.]

Deft corporation offerred in evidence a deed from John I. Waterbury and T. Jefferson Coolidge, Jr., to the Peoples Wharf Company, a corporation; to the introduction of which *plff* objected on the grounds, first, it is immaterial; second, it is incompetent.

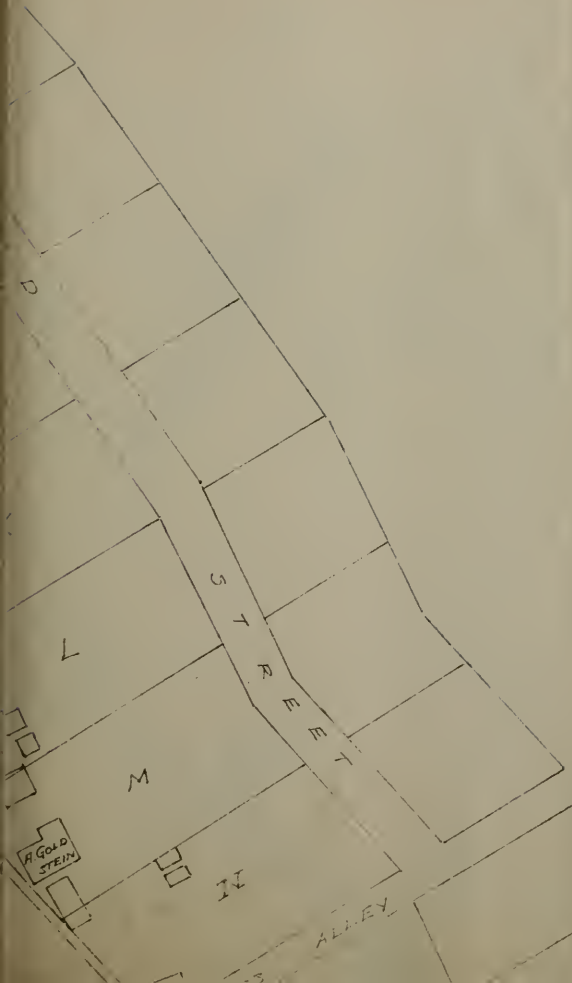
Mr. LYONS.—We ask permission to substitute a certified copy of this Deed, together with a tracing of the map attached thereto.

Objection overruled without prejudice to a renewal and permission is given to substitute certified copy of Deed with a tracing of the map.

Plaintiff excepts.

VIHARE HOUSE
VIHARE HOUSE
VIHARE
CAPROL
OLD PILES
OLD PILES
PILES

"A"



Deed and Map received in evidence as Defendant's Exh. "D" Case No. 477-A, and Deed reads as follows:

Defendant's Exhibit "D" (Continued).

This indenture, made this first day of April, Eighteen Hundred and Ninety-Eight, by and between John I. Waterbury, of Morristown, in the State of New Jersey, and T. Jefferson Coolidge, Jr., of the City of Boston, in the State of Massachusetts, parties of the first, and the Pacific Coast Company, a corporation duly organized and existing under the laws of the State of New Jersey, party of the second part:—

Whereas, the parties of the first part, acting on behalf of themselves and other persons, members of a reorganization committee, appointed, in accordance with a plan and agreement for reorganization of the Oregon Improvement Company, to carry said plan and agreement into effect, have heretofore, pursuant to, and in furtherance of such plan of reorganization, and thereunder for the benefit of the party of the second part, the company aforesaid, pursuant to such plan, acquired certain property, estate and rights in the property hereinafter described.

Now, Therefore, this Indenture, Witnesseth: That the parties of the first part in consideration of the premises and of the sum of Ten Dollars ($10) to each of them in hand paid by the party of the second part, and other valuable consideration, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, assigned, transferred, quitclaimed and set

over, and do by these presents grant, bargain, sell, alien, remise, release, and confirm, assign, transfer, quitclaim and set over unto the said party of the second part, its successors and assigns forever.

All and singular, the property, estate, right, title and interest, claim and possession of the parties of the first part, in or to the following-described property situate, lying, and being at or near the town of Juneau, in the District of Alaska, that is to say:

Parcel 1. All that piece or parcel of land, and land under the water of Gastineaux Channel, together with the buildings, wharves, bridges and other superstructures thereon erected bounded and described as follows:

Beginning at a point on the northeasterly corner of the Fisher & Tibbetts old wharfsite about one and one-half feet northeasterly from the northeast corner post of said wharf, which said point of beginning is distant 170.2 feet on a course north 29 degrees, 36 minutes west from a point designated as a corner number Four of the exterior boundary of Juneau Townsite, survey No. 1; thence south 26 degrees, 17 minutes east 126 feet, more or less, to a line of piles defining the southeast boundary of wharfsite; thence along said line of piles south 55 degrees, 30 minutes west 440 feet to the southwest corner of the Peoples Wharf, so-called, in deep water thence along the southwesterly side of said wharf north 47 degrees, west 108 feet, thence still along the same north 28 degrees west 100 feet, to the corner of the Engine House shed, standing upon the premises hereby conveyed, thence along the same and along the south-

westerly side of Coal Bunker building upon said premises, north 14 degrees west 125 feet, thence north 76 degrees, east along the northwesterly side of said Coal Bunkers building 24 feet to the northeast corner thereof, thence north 14 degrees, west 352 feet, thence north 48 degrees, 30 minutes west 38 feet to a point designated as corner No. 7 of the exterior boundary of the Juneau Townsite, Survey No. 1; thence along the meander line of the Juneau townsite south 83 degrees, 4 minutes, east 44 feet, thence south 14 degrees east 368 feet to northwest corner of a warehouse standing on the said premises; thence north 76 degrees, east 32 feet to the northeasterly corner of said warehouse, thence south 14 degrees, east 80 feet to the southeasterly corner of said warehouse, thence south 21 degrees, 30 minutes, east 122 feet to the northwesterly side of the wharf standing upon said premises; thence north 51 degrees, 30 minutes east 130 feet, thence due east 9 feet, thence north 51 degrees, 30 minutes, east 275 feet to the point or place of beginning. Be the said several dimensions more or less; Said course being expressed from the true meridian, allowing a magnetice variation of 30 degrees east of north; Being the same premises designated as Parcel 1, and colored yellow upon the annexed plan or survey thereof marked "A," and hereby made a part of this deed and description, and the wharf known as the "Peoples Wharf," standing upon said premises, or some part thereof.

Parcel II. All that piece or parcel of land, and land under the waters of the Gastineaux Channel aforesaid, together with the buildings, wharves,

bridges and other superstructures and improvements thereon erected, bounded and described as follows:

Beginning at a point designated as corner No. 8 of the exterior boundary of Juneau townsite, survey No. 1, thence north 57 degrees, 4 minutes east 30 feet, thence south 31 degrees, 15 minutes, east 320 feet, thence along the northeast side of the lumber warehouses standing upon the premises hereby conveyed, north 67 degrees, 45 minutes east 100 feet to the southwest side of Decker Brothers' wharf, thence along the line of division between the same and the premises hereby conveyed, south 14 degrees, east 128 feet to the outer edge of the wharf standing upon the premises hereby conveyed, known as the Juneau City Wharf, thence along the same south 75 degrees, 45 minutes, west 272 feet, thence still along the same north 1 degree, 30 minutes, west, 168 feet, thence north 75 degrees, east 33 feet, thence north 8 degrees, 45 minutes, west 20 feet, thence north 29 degrees, west 172 feet, thence north 44 degrees, west 50 feet, to the northwesterly side of Block F., and the southeast side of First Street, thence along the same north 46 degrees, east 50 feet to the southwesterly side of Main Street, or the same produced, thence along the same and the northeast of block F. aforesaid, south 44 degrees, east 9 4/10 feet to point or place of beginning: Be the said several dimensions more or less, and the aforesaid courses being expressed from the true meridian, allowing a magnetic variation of 30 degrees east of north, and the wharf known as the "Juneau City Wharf," being situated on said Parcel II, or some part thereof.

Parcel III. All that piece or parcel of land, and land under water of the Gastineaux Channel aforesaid, together with the buildings, wharves, bridges and other superstructures thereon erected, described as follows:

The center line thereof is marked by a blazed tree and notice, and a large boulder near low water mark in line south, 25 degrees west. Said premises are bounded and described as follows: Beginning at a stake and mound of stone, thence North 25 degrees, east 600 feet, thence south 65 degrees east 600 feet, thence south 25 degrees, west 600 feet to a stake and mound of stone at low water mark, thence north 15 degrees, west, 600 feet along the water line to the point or place of beginning; the above courses being magnetic as the needle points: the wharf known as the Murry and Carroll, or the Carrol and Murry wharf, being situate upon said Parcel III, or some part thereof: intending hereby to include in the above-described premises, all of the premises more particularly mentioned and described in the several instruments respectively, recorded in the office of the recorder of the Juneau Recording District, at said Juneau, Alaska, in volume "A" at page 27, and at page 144, and in volume "B" at page 244, of said records: Said Parcels II and III, being more particularly designated as parcels II and III, respectively, and colored red, upon the aforesaid annexed plan or survey, marked "A," hereby made a part of this deed and description, and said parcel II and III being the same premises conveyed to the parties

of the first part by James Carroll and D. H. Carroll, his wife, and Ed. C. Hughes, by deed dated March 13, 1897, and recorded in the office of the aforesaid recorded April 13, 1897, in Book 12 of Deeds, on pages 18 to 200 inclusive.

And also all right of way of the parties of the first part, their servants and licensees, for ingress and egress to, from and upon the above-described premises, and every part thereof, together with all and singular the tenements, hereditaments and appurtenances, and all rights, privileges and franchises, including all riparian, littoral and possessory rights incident, appertaining or appendant thereto, or usually had and enjoyed therewith.

And also all and singular, the estate, rights, title and interest, claim and demand, possession, use and occupation of whatsoever name or nature, which the parties of the first part now have, or to which now or hereafter they might become entitled by virtue of any present estate or right to the shore and waters and the land under the waters, of the Gastineaux Channel aforesaid, or any part thereof; including the right to enter, occupy, pre-empt, reclaim, use or improve the same, or any part thereof, or to erect, construct, extend or maintain docks, wharves, moorings, approaches, causeways, bridges, warehouses or any other superstructures thereon.

And also, all and singular, the estate, right, title, interest, claim, possession and demand of whatsoever name or nature, which the parties of the first part now have, or which they may or might hereafter acquire under and by virtue of the following deeds, that is to

say: Three certain deeds to the parties of the first part: The first thereof made by Mary K. Griffin, dated May 12, 1897, and recorded in the office of said Recorder June 19th, 1897, in Book 12 of Deeds, at pages 272 and 273; the second made by Frank Starr, dated April 16, 1897, and recorded in the office of said recorder April 17th, 1897, in Book 12 of Deeds at page 211; The third made by Frank W. Griffin and Sarah E. Murray, dated March 20th, 1897, and recorded in the office of said recorder April 13, 1897, in Book 12 of Deeds, pages 201 and 202; And also seven certain deeds, to the Peoples Wharf Company as follows; The first: made by Charles W. Young, dated and recorded March 23rd, 1897, in the office of said recorder in Book 12 of Deeds, at pages 131 and 132; the second: made by F. W. Young and J. F. Maloney dated and recorded March 23d, 1897, in the office of said recorder, in Book 12 of Deeds at pages 130 and 131. The third made by Emery Valentine and Katherine, his wife, dated February 20th, 1897, and recorded in the office of said recorder April 16th, 1897, in Book 12 of Deeds, at page 209; The fourth: made by Frank Young and J. F. Maloney, dated February 20th, 1897, and recorded in the office of said recorder April 16, 1897, in Book 12 of Deeds, at page 206. The fifth: made by Edward O. Decker, and Lizzie, his wife, and Jay Decker, dated February 20th, 1897, and recorded in the office of said recorder April 16, 1897 in book 12 of Deeds at page 208. The sixth: made by James P. Jorgenson and Lizzie, his wife, dated February 20th, 1897, and recorded in the office of said recorder April 16, 1897, in Book 12 of

Deeds, at page 207. The seventh: made by Charles W. Young, dated February 20th, 1897, and recorded in the office of said recorder, April 16th, 1897, in book 12 of Deeds, at page 205.

To have and to hold, all and singular, the above described premises, and every part thereof, together with the appurtenances to the said party of the second part, its successors and assigns forever.

And said parties of the first part hereby constitute and appoint the party of the second part their true and lawful attorney irrevocable, for them, and in their name place and stead, but at its own proper costs and charges, and to its *and benefit,* to apply for, receive and hold any patent, grant, or deed, to which the parties of the first part may now, or hereafter, might be entitled to receive by virtue of any estate or right, possession or improvements above granted, giving their said attorney full power to do everything whatsoever, requisite and necessary to be done in the premises, as fully as they, the said parties of the first part, could so, if personally present, with *full of* substitution and revocation, hereby ratifying and confirming all that their said attorney, or his substitute shall lawfully do or cause to be done.

Where the contrary is not expressed, the terms "parties of the first part" herein includes their respective heirs, executors, administrators and assigns, and the term "party of the second part" includes its successors and assigns. It is expressly stipulated, that no covenant by the parties of the first part shall be implied herein.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOHN I. WATERBURY (Seal)
T. JEFFERSON COOLIDGE (Seal)

State of New York,
County of New York,—ss.

I. Samuel F. Jarvis Jr. do hereby certify that on this twelfth day of April, 1898, personally appeared before me T. Jefferon Coolidge Jr., to me personally known to be one of the individuals described in and who executed the within instrument and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the purposes and uses therein mentioned.

Given under my hand and official seal this twelfth day of April, A. D. 1898.

(Seal) SAMUEL F. JARVIS JR.
Notary Public for New York County.

State of New York,
City and County of New York,—ss.

I, Samuel F. Jarvis Jr., do hereby certify that on this twelfth day of April 1898, personally appeared before me John I. Waterbury, to me personally known to be one of the individuals described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this tenth day of April, A. D. 1898.

(Seal) SAMUEL F. JARVIS JR.

State of New York,
County of New York,—ss.

I, William Sohmer, Clerk of the County of New York, and also Clerk for the Supreme Court for the said County, the same being a Court of Record do hereby certify, That Samuel F. Jarvis Jr., whose name is subscribed to the certificate of the proof of acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof and acknowledgment, a Notary Public in and for said County, duly commissioned and sworn and authorized by the laws of said State to take acknowledgements and proofs of deeds or conveyances for land, tenements or hereditaments in said State of New York. And further that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 22d day of June, 1898.

(Seal) WM. SOHMER,
Clerk.

Filed for record at 12:20 M. July 5, 1898.

NORMAN E. MALCOLM,
Recorder.

Vol. 13, p. 499.

United States of America,
District of Alaska,—ss.

I hereby certify that the foregoing is a true, correct and complete transcript of the record, and of the whole thereof, as the same appears of record in Book 14 of Deeds at 499 et *seq* of the records of the Juneau Recording District, District of Alaska.

Witness my hand and official seal this 24th day of April, 1906.

(Commissioner's Seal) H. H. FOLSOM,
Recorder for Juneau Recording District, Alaska.

Mr. LYONS.—The pleadings admit that we are the lessees; the only other question now is as to the value of the improvements that we have constructed on the ground. We allege that this property and all of it is worth $30,000 and the plaintiff in reply denies that the property on this particular frontage is worth more than $1500. I don't know whether the Court considers this a material issue in this matter.

[Crossed out in original:]

The COURT.—I don't see how it is material what the value of it is.

Mr. LYONS.—I don't *see* exactly see that it is myself, only it might be *am*terial for this purpose. If the evidence should show that the plaintiff has waited these many years and allowed this large expenditure to be incurred, the Court might consider that question.

The COURT.—On the question of laches, you mean?

Mr. LYONS.—Yes.

[Crossed out in original:]

Mr. BARNES.—We object to it because it is immaterial and tends to proce no issue raised by the pleadings, the allegation of the Complaint being that the premises abutted upon the mean high tide line of Gastineaux Channel, and it is not denied by the Answer.

Mr. LYONS.—As long as that objection goes in that is all I want, if your Honor please.

The COURT.—All right let it go as it is without a ruling.

Testimony.

W. F. SWAN, a witness for the Defendant, being first duly sworn, on oath testified as follows:

Direct Examination.

Mr. LYONS.—Q. Where do you reside?

A. On the Pacific Coast wharf in Juneau, Alaska.

Q. What is your occupation?

A. Agent for the Pacific Coast Steamship Company, the Pacific Coast Company and the Alaska Express Company.

Q. How long have you held that position?

A. About two and a half years.

Q. Are you familiar with the property in controversy in this case? A. Yes.

Q. Are you familiar with the Peoples Wharf Company—

(Testimony of W. F. Swan.)

Mr. BARNES.—We object to the question as assuming a fact to exist which is not in the evidence, and further that the Articles of Incorporation of the Peop*l*es Wharf Company does not permit them to buy any land, neither does it permit them to sell any land, consequently they had no wharf.

Mr. LYONS.—I want to show the position of the wharf with reference to this property; in fact, to show there is an approach to this property and the wharf. I want also to show the structures on this property to which we hold a deed.

Mr. BARNES.—We object to it because there has been no purchase.

The COURT.—I will overrule the objection without prejudice to a motion to renew it later in the case on the theory that they had no right to buy.

Plaintiff excepts.

Mr. LYONS.—Q. I will ask you if you are fami*l*ar with that property?

A. Yes, I am fami*l*ar with the property that is owned by the Pacific Coast Company.

Q. I will ask you if you are fami*l*ar with this property in *front Block* L that is sued for?

Mr. BARNES.—We object to showing him the Map.

The COURT.—This is the Map offered in evidence.

Mr. LYONS.—I call your attention to Plaintiff's Exhibit "C" and ask you if you are fami*l*ar with the property indicated on that Plat? I will just ask him that question generally first.

(Testimony of W. F. Swan.)

Same objection as was offered to the objection of the map.

Objection overruled without prejudice to motion to renew.

Plaintiff excepts.

A. Yes, I am fami*lar* with it. I understand it.

Mr. LYONS.—Q. Now with reference to that portion which is in front of Block L, the property described in the Plaintiff's Complaint—the water front property in front of Block L described,—what structures are owned there by the Pacific Coast Company?

A. Well, there is an old paint-shop and one structure known as the Blacksmith-shop, there is one float and the wharf known as the "Peop*l*es Wharf," there is an approach from the Peoples' Wharf to front of Block L; that structure is also owned by the Pacific Coast Company.

Q. What is the value of all of these structures you have described?

Mr. BARNES.—To which we object on the ground that it is immaterial.

Objection overruled.

Plaintiff excepts.

A. About $25,000.

Q. That includes, I understand, the Peop*l*es Wharf. A. Yes, sir.

Mr. BARNES.—I move to strike it o*u*r because he did not qualify the witness to show that he had any knowledge of values.

(Testimony of W. F. Swan.)

Mr. LYONS.—Q. I will ask you if you know the value of the structures including the Peop*l*es Wharf, in front of Block L, as you have described?

Mr. BARNES.—To which we object; it is the cost of constructing them; the same ruling that the Court made to our witness, that it must be the value of the business done, would apply. The true test is what it would cost, not what it is worth.

Mr. LYONS.—What we are offering this testimony for is to show, as your Honor has suggested, *is* the laches of the Plaintiff in allowing us to go on and spend all this money.

After argument.

The COURT.—I think the test is what the value of the premises is. Of course, if they were wiped out the site would be there, the location would be there, and they might again re-construct it. It is the value of the premises, not the structures themselves, however, they might stand. I think the question is admiss*a*ble. I think you should qualify him first as to his knowledge of values in general.

Mr. LYONS.—Q. Are you fami*l*ar with the value of this property in front of Block L on which it stands?

Mr. BARNES.—To which we object. The ruling of the Court is the value of the ground.

Mr. LYONS.—I think we ought to be allowed to show what the value of that property is to us as it stands, not what the value of the structures are as *segrated* from the land.

(Testimony of W. F. Swan.)

The COURT.—The point for which you offer this testimony is to show the expenditure of money on this land which she, by her laches, has permitted you to go on and expend. Now the value of the land itself the value of the location I don't think enters into it. I think it is the value of the structures.

Defendant excepts.

Mr. LYONS.—Q. I will ask you what is the value of all the structures, if you are famil*a*r with the values of all the structures, that have been described in front of Lot L, including the People*s* Wharf?

Mr. BARNES.—We object on the ground that it is immaterial and assumes a fact to exist which is not in the evidence, and the same objection as before, that the People*s* Wharf Company made no purchase.

Same ruling.

Plaintiff excepts.

A. Yes, sir.

Mr. LYONS.—Q. What is the present value of all the structures you have described?

Same objection as to the last question.

Same ruling.

Plaintiff excepts.

A. It would be at least $18,000.

Cross-examination.

Mr. BARNES.—Q. What structures are down there at the People*s* Wharf. How much of it is in front of Block L?

A. I don't know until I go down and measure it.

(Testimony of W. F. Swan.)

Q. What is the value of that that is in front of Block L? A. It is worth about $7,000.

Q. How do you arrive at it?

A. Well, by the original costs and improvements.

Q. What was the original costs and improvements? A. The original cost was $7,000.

Q. How do you arrive at it?

A. I suppose that is what we paid for it.

Q. You suppose? A. Yes.

Q. You don't know anything about it?

A. I didn't pay for it.

Q. Do you know anything about it?

A. Yes.

Q. I ask you, how much was the cost?

A. $7,000.

Q. Exactly $7,000?

A. I don't know whether it was exactly $7,000.

Q. How many feet of the wharf is there in front of Block L.?

A. I don't know that. It cost $7,000.

Q. How do you know what cost that *if* you don't know the part that is in front of Block L?

A. That is the selling price given to me when I came to take charge of the property.

Q. That is the selling price?

A. That is what we bought it for.

Q. You paid $7,000 for it? A. Yes, sir.

Q. Then you didn't erect the improvements yourselves?

(Testimony of W. F. Swan.)

The COURT.—Which do you mean, the Pacific Coast Steamship Company?

Mr. BARNES.—The Pacific Coast Steamship Company.

Mr. LYONS.—I don't think the witness has testified the Pacific Coast Steamship Company has bought it.

WITNESS.—No. They didn't own the property at all.

Mr. BARNES.—Now, I want to find out what the Pacific Coast Steamship Company paid for it.

A. They didn't pay anything for it.

Q. The Pacific Coast Steamship Company has been in possession of it for some time, haven't they?

A. They have it leased.

Q. They built this last building down there, didn't they? A. They did not.

Q. Who did build it?

A. The Pacific Coast Company.

Q. You were the agent who built it?

A. Yes.

Q. You were warned not to build it?

A. No.

Q. Do you remember down here by the corner of the drug store, at McFarland's, when the stringers had been laid on the ground there and I asked you in words substantially to this effect: "Who is building that building down there," and you says "We are building it." I says to you "Don't you know you have no right to build it, that property belongs to

(Testimony of W. F. Swan.)

Mrs. Decker," and you says "We will build it anyhow"?

Mr. LYONS.—We object to that as not proper cross-examination.

Mr. BARNES.—I propose to show by this witness that before the last building was erected I told him not to erect it. I was the attorney for the plaintiff in this case and I told him not to erect it.

The COURT.—There is not any evidence here that he is agent for the Pacific Coast Company. He has testified he was agent for the Pacific Coast Steamship Company.

WITNESS.—And the Pacific Coast Company.

After Argument.

The COURT.—I don't think it is cross-examination. I sustain the objection.

Mr. BARNES.—Q. When were those buildings erected?

A. Well, I misunderstood you in regard to the buildings; I thought you were talking about this new building down by our office.

The COURT.—He asks you now when were the buildings on this property you have been testifying to; when were they erected?

A. I don't know.

Mr. BARNES.—Q. Don't you know when any of them were erected?

A. None except the approach.

Q. Do you know when the building now used as the Union Iron Works was erected?

(Testimony of W. F. Swan.)

A. No, sir.

Q. Do you know where the building that you say in your Answer belongs to the plaintiff down in front of Block L is?

Objected to by the defendant as immaterial.

Mr. BARNES.—I want to show if he knows the value of each individual structure.

The COURT.—Ask him that.

Mr. BARNES.—Q. What is the first building you know of immediately opposite the southeast corner of Block L which you say belongs—

The COURT.—Point out the buildings on there and ask him the value of them.

Mr. BARNES.—What building is that? (Points to Map.)

A. The building occupied by the Union Iron Works.

Q. What is the value of it, if you know?

A. $1,000.

Q. What is the value of the next building, if you please? A. I don't know.

Q. Do you know who that belongs to?

A. Yes.

Q. Who? A. It belongs to Mr. Decker.

Mr. LYONS.—We move to strike that out.

Mr. BARNES.—I don't want the value of that. This building immediately adjoining the Decker Brothers building. What is the value of that?

The COURT.—Ask him what building it is.

(Testimony of W. F. Swan.)

Q. Do you know the building immediately adjoining Decker Brothers on the west of that?

A. Yes.

Q. How much of that is opposite Block L?

A. I don't know.

Q. You don't know the value of that, do you? If you don't know how much of it is opposite Block L. you don't know the value of it opposite Block L. do you? A. No answer.

Q. Why do you hesitate? You are a bookkeeper and man of business, why are you holding us here all this time? Answer that question. According to that Map there is none of it opposite Block L. is there? A. Yes. About one-half of it.

Q. How much is one-half of it worth?

A. About $600.

Q. Will you kindly look at this line dividing Block L. and Block K. Do you swear that that line dividing Block L. and Block K. cuts in half this building immediately west of the Decker building?

A. No, sir.

Q. How much of it is opposite Block L.?

A. I would have to go measure it.

Q. You don't know, do you?

A. I don't know in feet.

Q. When you say it costs $600, what is opposite Block L. you don't know anything about it, do you?

A. Yes, sir.

Q. What do you know about?

(Testimony of W. F. Swan.)

The COURT.—What is the value of the building itself, Mr. Swan? A. No answer.

The COURT.—Oh, the exact value is not necessary. Your idea of it is what we are after.

A. About $1,000.

Mr. BARNES.—Q. What part of it is opposite Block L.? A. I told you I don't know.

Q. So you don't know what is the value of it opposite Block L.?

The COURT.—The approximate proportion.

A. I would say one-third of it.

Mr. BARNES.—Q. Now you say this wharf, the part that is marked Peoples Wharf, up to the line of Block L. cost $7,000, did it? A. How's that?

Q. You say this part of the Peoples Wharf that is abutting opposite Block L., you say it cost $7,000 did it? A. Yes, sir.

Q. How much did it all cost?

A. I don't know.

Q. How, if you know that that part cost $7,000, is it that you don't know how much all of this cost opposite Block L.?

A. I know that it is worth that.

Q. We are not asking that; I ask you if you know how much it cost?

The COURT.—The value. You are not asking the cost. You are confusing the witness. If you mean what it cost to the Pacific Coast Company that is a different thing, if you know how much it cost to construct it. You don't know what the cost of

(Testimony of W. F. Swan.)

the construction of any of these buildings is do you? A. No, sir.

Mr. BARNES.—Q. There is a building immediately abutting on this building here of the Decker Brothers; was not this building that was immediately abutting on the Decker building, and not shown on the map, was not that building erected against the protest of the plaintiff in this case?

Mr. LYONS.—We object to that on the grounds that it is immaterial and not cross-examination.

The COURT.—It is not cross-examination.

Plaintiff excepts.

Mr. BARNES.—I am endeavoring to prove by this witness that the most important and valuable building that has been erected on that property was erected against the protest of the plaintiff in this case.

The COURT.—Do you wish to make him your witness for that purpose?

Mr. BARNES.—No, sir.

The COURT.—You cannot do it unless you make him your witness.

Defendant rests.

ELIZABETH DECKER, the plaintiff being recalled on rebuttal, testified as follows:

Direct Examination.

Mr. BARNES.—Q. Mrs. Decker, what has been your calling and occupation since you have been in Alaska?

Objected to by the defendant as not rebuttal.

(Testimony of Elizabeth Decker.)

The COURT.—What is the purpose of it? To show the reason why she did not bring this action before?

Mr. BARNES.—Yes, and to show the reason why she stood by and saw these expenses incurred.

Mr. LYONS.—We object to any testimony in support of Paragraph 2nd. of the Reply for the reason that if true literally and in spirit it is absolutely no defense to the laches in this case; it is no defense; it does not show why she executed the deed or that she was misled to sign the deed; it does not show any misrepresentation whatever. It merely shows that she was a housewife and not advised in business matters. It is absolutely incompetent and immaterial to sustain any proof that could be a defense, or could be a reason, a special reason, for her not bringing this suit a long time ago and we object to it for that reason.

Mr. BARNES.—It is simply to show the reason why she stood by and saw this work done and did not bring this action.

The COURT.—I will sustain the objection.

Mr. BARNES.—I offer now to prove, if the Court please, that the plaintiff in this case here, at all times in regard to her business has relied upon the advice of hired counsel and that none of them until the year last past has informed her of any of her rights herein, or offered to make that proof.

Mr. LYONS.—We object to the offer for the reason that it is incompetent, irrelevant and immaterial

(Testimony of Elizabeth Decker.)

and the pleadings do not show that the plaintiff called the attention of counsel to any alleged rights which she claimed in the premises in controversy, nor does she say that she was ignorant of what constitutes laches in her Reply, which simply states that she was ignorant of business methods and such statement does not justify her laches as shown in this case.

Objection sustained.

Plaintiff excepts.

Mr. BARNES.—Q. How much of the time, Mrs. Decker, since you have been in Alaska, how much of the time since 1893—I will change the question.

Objected to by counsel for the defendant as incompetent, irrelevant and immaterial and not rebuttal.

The COURT.—You have not got the question finished.

Mr. BARNES.—Q. How much of the time, Mrs. Decker, since October, 1893, up to the commencement of this suit, had you been a married woman?

Objected to by counsel for the defendant as incompetent, irrelevant and immaterial and not rebuttal and does not tend to sustain any of the issues raised by the Reply.

Objection overruled.

Mr. BARNES.—Q. How much of the time since October, 1893, up to 1895 have you been a married woman?

A. I have been a married woman since '92.

Q. Up to when? A. Until 1899.

Q. When did your husband die? A. 1899.

(Testimony of Elizabeth Decker.)

Q. And then how long since that time have you been a married woman, when you were married the second time? A. In 1902.

Q. And when were you divorced then?

Objected to by counsel for the defendant as not rebuttal.

I will admit it.

Mr. BARNES.—Q. When were you divorced?

A. In 1903.

Q. Last year, wasn't it?

Objected to by counsel for the defendant as leading.

A. Oh, in 1902 it was. I never looked it up. I forget.

Q. I say, what year was it you were divorced?

A. I don't remember.

Cross-examination.

Mr. LYONS.—Q. You are not married now, are you, Mrs. Decker? A. No, sir, I am not.

The COURT.—Insert in the record that the defendant renews his objections, and motions to strike heretofore made during the trial was taken under advisement; the plaintiff also renews her objections to the admission of evidence, and renews her motions to strike heretofore made, and the Court takes those under advisement.

Plaintiff's Objection, Exceptions, Etc.

Which objections and motions of plaintiff were by the Court overruled and *plff* duly excepted.

Plff duly excepted to the decree herein.

Plff duly excepted to the ruling of the Court in refusing to make the findings Nos. I, II, III, IV, and VI requested by plff.

Plff duly excepted to the ruling of the Court in refusing to find as conclusions of law Nos. III, IV, V, and VI as requested by plff.

Plff duly excepted to the ruling of the Court in refusing to amend findings of fact Nos. II, III, V, and VI, as requested by plff.

Plff duly excepted to finding No. III made by the Court.

Plff duly excepted to finding No. IV made by the Court.

Plff duly excepted to the findin*d* that *deft.* corporation is "not the real party in interest" in finding No. V.

Plff duly excepted to each of the conclusions of law made by the Court.

Plaintiff excepts to the sufficiency of the evidence to support the finding that the *plff* and E. O. Decker and J. M. Decker conveyed to the Peop*l*es Wharf Company, a corporation, all their littoral and riparian rights immediately abutting on Blocks L and K or did convey all of their littoral or riparian rights which they or either of them might thereafter acquire to the tide lands of said Gasta*n*aux Channel abutting

on said Blocks K and L., as is found in finding No. III.

Plaintiff objects to the sufficiency of the evidence to support the finding "that thereafter by mesne conveyances the Pacific Coast Company, a corporation, acquired all the rights, title and interest of said Peoples Wharf Company in and to all the littoral and riparian rights immediately upon said Blocks K and L., or that the Pacific Coast Steamship Company is the owner or entitled to the possession of the littoral and riparian rights abutting upon said Blocks K. and L. as is found in finding No. III.

Plaintiff excepts to the sufficiency of the evidence to support the finding that *plff* has no right, title or interest in or to any of the littoral or riparian rights or tide lands immediately abutting on and in front of said Blocks K and L as is found in finding No. IV.

Plaintiff excepts to the sufficiency of the evidence to support the findings that the Pacific Coast Steamship Company is not the real party in interest as is found in finding VII. *Plff* duly excepts to the refusal of the Court to make the findings requested by plff.

Plaintiff excepts to the sufficiency of the findings of fact to support the conclusions of law.

Plaintiff excepts to the sufficiency of the findings to support the decree.

These exceptions to the sufficiency of the findings were filed Jany. 7, 1908.

Certificate to Bill of Exceptions.

I, Royal A. Gunnison, Judge of the District Court for the District of Alaska, and the Judge who pre-

sided at the trial of the within-entitled cause, and being the Judge who rendered the decree dismissing said cause with costs, do hereby certify the within and foregoing bill of exceptions was duly presented to me for signature by counsel for *plff,* and for settlement and certification, within the time and in the manner prescribed by the rules and practice of this Court, to wit, on the 29th day of Oct., 1907, and that by the rules of this Court it is the duty of the Judge to set the time for settlement of all bills of exceptions and that in pursuance of that rule I fixed the 6th day of *Jany,* 1908, as the time for settling said bill and having examined the same and found it to be true and correct, I do now, within said time ~~and within the term of the Court at which said cause was tried and the said decree rendered,~~ allow, settle and certify the same, and order the same to be filed and to become a part of the record herein, and as a true and correct bill of exceptions.

R. A. G.

And I do further certify that said bill of exceptions contains the evidence and all the evidence, as agreed upon by counsel and that said evidence was received by me at the trial of said suit or otherwise, and my ruling thereon, and all matters and things of which I took judicial notice or knowledge, and all the proceedings in said suit in the order of their occurrence, which could or did concern, *relate or e*ffect the decree herein, and that I found as facts, from the evidence that the originals of all the exhibits of both *plff* and *defts* to have been filed with or issued, as set out in

said bill of exceptions to have been filed with or issued by said officers so named in said bill of exceptions.

Witness my hand and the seal of this Court this 8" day of *Jany,* 1908.

ROYAL A. GUNNISON,
Trial Judge.

(Indorsed) No. 477-A. In the District Court for Alaska, Division No. 1, at Juneau. Elizabeth Decker, Plaintiff, vs. Pacific Coast Steamship Co. et al., Defendant. *Plff's* Proposed Bill of Exceptions. E. M. Barnes, Attorney for plff. Office: Juneau, Alaska, Rooms 1 and 2 Valentine Building. Chambers of U. S. Judge *Rec'd* Oct. 29, 1907, at Ketchikan. Answered..... Filed *Jan* 8, 1908. C. C. Page, Clerk. By R. E. Robertson, Asst.

In the District Court for Alaska, Division No. 1, at Juneau.

ELIZABETH DECKER,

vs.

THE PACIFIC COAST STEAMSHIP CO. (a Corporation), and JOHN JOHNSTON.

Assignment of Errors.

I.

The Court erred in sustaining the objection of the *defts* to the question "Mrs. Decker, I *w*would ask you how much, if any, you have been damaged by the maint*ai*nence of those buildings on that property, by the Pacific Coast Steamship Company, as described in the answer?"

II.

The Court erred in sustaining the objection of *deft* to the question "Have you some knowledge, Mrs. Decker, of the amount of freight that you would probably be able to handle over your wharf, provided you had a wharf there?"

III.

The Court erred in sustaining the *defts* objection to *plffs* question "Do you know, generally, Mrs. Decker, from common repute and what you see in the newspapers, that the charges of these wharf companies here in Juneau are excessive?"

IV.

The Court erred in admitting in evidence by *deft,* against the objections of *plff* the deed dated *Ap'l* 20th, 1897, between Lizzie Decker, wife of E. O. Decker, and Jay M. Decker to the Peoples Wharf Company, a corporation.

V.

The Court erred in admitting in evidence by the *deft,* against the objections of *plff,* the articles of incorporation of the Peoples Wharf Company.

VI.

The Court erred in admitting in evidence by the *deft* against the objection of *plff*, a deed from the Peoples Wharf Company, a corporation, to John J. Waterbury and T. Jefferson Coolidge, Jr.

VII.

The Court erred in admitting in evidence by *deft, aginst* the objection of *plff,* a deed from John J. Waterbury and T. Jefferson Coolidge, Jr., to the Peoples Wharf Company, a corporation.

VIII.

The Court erred in permitting the *defts* witness Swan to answer for *deft* against the objection of *plff* the question "Are you familiar with the Peoples Wharf Company.

IX.

The Court erred in permitting the *defts* witness Swan to, against the objection of *plff,* answer the question "Q. I will ask you if you are familiar with this property in front of Block L, that is sued for?"

X.

The Court erred in permitting *defts* witness Swan, over the objection of *plff,* to answer the question "What is the value of those structures you have described?"

XI.

The Court erred in permitting the *defts* witness Swan, over the objection of *plff,* to answer the question "I will ask you what is the value of all the structures, that have been described in front of Lot L, including the Peoples Wharf.

XII.

The Court erred in permitting the *defts* witness Swan over the objection of *plff* to answer the question "I will ask you what is the value of all the structures, that have been described in front of Lot L, including the Peoples Wharf?"

XIII.

The Court erred in permitting *defts* witness Swan to answer, over the objection of *plff*, "What is the

present value of all the structures you have described?"

XIV.

The Court erred in sustaining the *defts* objection to the question asked the witness Swan by *plff* asked the witness Swan by *plff* "There is a building immediately abutting on the Decker building and not shown on the map, was not that building erected against the protest of the *plff* in this case?"

XV.

The Court erred *in sustainong* in sustaining the *defts* objection to the offer made by *plff* to prove that the *plff* in this case at all times in regard to her business has relied upon the advice of hired counsel and that none of them until the present year last *passed* has informed her of any of her rights herein.

XVI.

The Court erred in overruling the objections and motions of *plff* renewed by *plff* under the permission of the Court at the close of the testimony.

XVII.

The Court erred in rendering the decree herein.

XVIII.

The Court erred in refusing to make findings I, II, III, IV and V*i* requested by *plff*.

XIX.

The Court erred in refusing to find as conclusions of law findings Nos. III, IV, V, and V*i* as requested by *plff*.

XX.

The Court erred in making findings No. III.

XXI.

The Court erred in making finding No. IV.

XXII.

The Court erred in making the finding that *deft* corporation is not the real party in interest.

XXIII.

The Court erred in its conclusions of law herein.

E. M. BARNES,
Atty for *plff*

(Indorsed) No. 477-A. In the District Court for Alaska, Division No. 1, at Juneau. Elizabeth Decker, plaintiff, vs. Pacific Coast Steamship Co., a corporation, et al, defendant. Assignment of errors. Filed *Jan* 9, 1908, C. C. Page, Clerk, by A. W. Fox, Deputy. E. M. Barnes, attorney for *plff* Office: Juneau, Alaska, rooms 1 and 2, Valentine Building.

In the District Court for Alaska, Division No. 1, at Juneau.

No. 477-A.

ELIZABETH DECKER

vs.

PACIFIC COAST STEAMSHIP CO. (a Corporation), and JOHN JOHNSTON.

Petition for Appeal.

The above named *plff* considering herself aggrieved by the order and decree made and entered in the above entitled suit on the day of Jan'y, 1907, wherein and whereby it was adjudged and decreed that the suit of *plff* be dismissed and decreed that the

deft corporation have judgement against the said named plaintiff for the costs of this suit, amounting to the sum of thirty-four & 80/100 dollars, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors herein, and prays that this, her petition for appeal, *may allowed* and that a transcript of the records, papers and proceedings upon which said decree was made, duly authenticated, may be sent up to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, Cal.

Juneau, *Jany* 8, 1908.

E. M. BARNES,
Attorney for *plff*.

(Indorsed) No. 477-A. In the District Court of Alaska, Division No. 1, at Juneau. Elizabeth Decker vs. Pacific Coast Steamship Company, a corporation, et al. Petition for appeal. Filed *Jan* 9, 1908, C. C. Page, Clerk, A. W. Fox, Deputy. E. M. Barnes, attorney for *plff*. Office: Juneau, Alaska, rooms 1 and 2 Valentine Building.

In the District Court for Alaska, Division No. 1, at Juneau.

No. 477-A.

ELIZABETH DECKER

vs.

PACIFIC COAST STEAMSHIP CO. (a Corporation), and JOHN JOHNSTON,

Defts.

Order Allowing Appeal.

At a stated term, to wit, the *Dec* term, 1907, of the District Court for the District of Alaska, Division Number one at Juneau, held in the courtroom of said court at the city of Juneau, Alaska, on the 8th day of *Jany* 1908, present, the Honorable Royal A. Gunnison, Judge; on motion of E. M. Barnes, attorney for the *plff*, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree heretofore allowed and entered herein, be and the same is hereby allowed and that a certified transcript of the record and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

It is further ordered that the bond on appeal be fixed at the sum of Five hundred dollars, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal.

Dated Juneau, Alaska. In open court this 9th day of Jan'y, 1908.

ROYAL A. GUNNISON,
Judge.

(Indorsed) No. 477-A. In the District Court for Alaska, Division No. 1, at Juneau. Elizabeth Decker, plaintiff, vs. Pacific Coast Steamship Co., a corporation, et al, *defendant.* Order allowing appeal. Filed *Jan* 9, 1908, C. C. Page, Clerk, by A. W. Fox, Deputy. E. M. Barnes, attorney for *plff,* office: Juneau, Alaska, rooms 1 and 2 Valentine Building.

In the District Court for Alaska, Division No. 1, at Juneau.

No. 477-A.

ELIZABETH DECKER

vs.

PACIFIC COAST STEAMSHIP CO. (a Corporation), and JOHN JOHNSTON.

Notice of Appeal.

To Pacific Coast Steamship Co., a corporation, defendant, and to Shackleford & Lyons, its attorneys,

You are hereby notified that the *plff* herein intends to and does hereby appeal from the final decree of the District Court for the District of Alaska, Division Number One, made and entered on the 11th day of *Jany,* 1907, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Dated Juneau, Alaska, this 9th day of *Jany,* 1908.

E. M. BARNES,
Attorney for

Due service of a copy of the within is admitted this 9 day of *Jany,* 1908.

SHACKLEFORD & LYONS,
Attorney for defendant corporation.

(Indorsed) No. 447. In the District Court for Alaska, Division No. 1, at Juneau. Elizabeth Decker, plaintiff, vs. Pacific Coast Steamship Co., a corporation, et al, defendant. Notice of appeal. Filed *Jan* 9, 1908, C. C. Page, Clerk, by A. W. Fox, Deputy. E. M. Barnes, attorney for appellant. Office: Juneau, Alaska, rooms 1 and 2 Valentine Building.

In the District Court for Alaska, Division No. 1, at Juneau.

No. 477-A.

ELIZABETH DECKER

vs.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation), and JOHN JOHNSTON,

Defts.

Bond on Appeal.

Know all men by these presents that we, Elizabeth Decker, as principal and George F. Miller as surety are held and firmly bound unto the Pacific Coast Steamship Company, a corporation, in the penal sum of five hundred dollars to be paid to the said Pacific Coast Steamship Company, corporation or to its as-

signs, for which payment well and truly to be *am*de we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally firmly by these presents. Signed and sealed with our seals, and dated this 15th day of January, 1908.

Whereas, lately at a session of the District Court for the District of Alaska, Division Number One, at Juneau, in a suit pending between said Elizabeth Decker as plaintiff and said Pacific Coast Steamship Company, corporation, and John Johnston as *defts,* the said Pacific Coast Steamship Company *corporation* recovered a decree of dismissal of said suit, and the said Elizabeth Decker having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said decree, and a citation directed to said corporation has issued, citing and admonishing it to appear and be at the United States Circuit Court of Appeals for the 9th Circuit, to be held at the City of San Francisco, State of California, Now the condition of the above obligation is such, that if the said Elizabeth Decker shall prosecute her said appeal to effect and shall answer all damages and costs that may be awarded against her if she fails to make her appeal good, then the above obligation is to be void, otherwise to remain in full force, virtue and effect.

ELIZABETH DECKER. (Seal)
GEORGE F. MILLER, (Seal)

United States of America,
District of Alaska,—ss.

I, George F. Miller, the surety mentioned in the foregoing obligation, being first duly sworn according to law, depose and say, that I am a householder and resident within the District of Alaska; I am in all respects qualified to become surety on appeal in said District; that I am worth the sum of one thousand dollars over and above all my just debts and liabilities in *propert* situate within said District, exclusive of pr*i*perty exempt from execution and forced sale.

GEORGE F. MILLER.

Subscribed and sworn to before me, Jan'y 13th, 1908.

(Seal) GUY McNAUGHTON,
Notary Public for Alaska.

And I further certify that the within named parties duly acknowledged to me severally that they executed the said bond for the uses and purposes therein mentioned.

Witness my hand and seal this ——— day of January, 1908.

(Seal) GUY McNAUGHTON,
Notary Public for Alaska.

The foregoing bond is hereby approved.

Dated January 27, 1908.

ROYAL A. GUNNISON,
District Judge.

(Endorsed): No. 477-A. In the District Court for Alaska, Division No. 1, at Juneau. Elizabeth Decker, plaintiff, vs. Pacific Coast Steamship Co., et al., defendants. Bond on Appeal. Filed *Jan* 27, 1908. C. C. Page, Clerk. By A. W. Fox, Deputy. E. M. Barnes, Attorney for Pl'ff. Office: Juneau, Alaska. Rooms 1 and 2, Valentine Building.

In the District Court for Alaska, Division No. 1, at Juneau.

No. 477.

ELIZABETH DECKER,

vs.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation) and JOHN JOHNSTON,

Citation (Original).

The President of the United States of America to Pacific Coast Steamship Company, a Corporation, and to Shackleford & Lyons, its Attorney:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the District Court of the District of Alaska, Division Number One at Juneau, in the case wherein Elizabeth Decker is plaintiff and appellant and you are the defendant and respondent, to show cause if any there be, why the decree in the said appeal mentioned should not be corrected and

speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United *State* of America, this 8th day of *Jany* A. D. 1908, and of the Independence of the United States the one hundred and thirty-first.

ROYAL A. GUNNISON,
Judge.

[Seal] Attest: C. C. PAGE,
Clerk.
By A. W. Fox,
Deputy.

Due service of a copy of the within is admitted this 9th day of Jany., 1908.

SHACKLEFORD & LYONS,
Attorneys for Deft. Corporation.

[Endorsed]: No. 477-A. In the District Court for Alaska, Division No. 1, at Juneau. Elizabeth Decker, Plaintiff, vs. Pacific Coast Steamship Company, a Corporation et al., Defendant. Citation. Filed Jan. 9, 1908. C. C. Page, Clerk. By A. W. Fox, Deputy. E. M. Barnes, Attorney for Plff. & Appellant. Office: Juneau, Alaska. Rooms 1 and 2, Valentine Building.

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 477-A.

ELIZABETH DECKER,

Plaintiff,

vs.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation) and JOHN JOHNSTON,

Defendants.

Clerk's Certificate to Transcript of Record.

I, C. C. Page, Clerk of the District Court for the District of Alaska, Division No. 1, do hereby certify that the foregoing and hereto annexed 96 pages of typewritten matter, numbered from 1 to 96, both inclusive, constitute a full, true and correct copy of the record and the whole thereof, as per plaintiff's and appellant's praecipe on file herein and made a part hereof, in cause No. 477-A, wherein Elizabeth Decker is plaintiff and appellant, and the Pacific Coast Steamship Company, a corporation, and John Johnston are defendants and appellees; that the same is as it appears of record and on file in my office; and that the said record is by virtue of the order of appeal and citation issued in this cause, and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office and that the cost of preparation, examination and certificate, amounting to

Forty-two dollars and thirty-five cents ($42.35) has been paid to me by counsel for the appellant.

In witness whereof I have hereunto set my hand and affixed the seal of this court at Juneau, Alaska, this 29th day of January, A. D. 1908.

[Seal] C. C. PAGE,
Clerk.

[Endorsed]: No. 1564. United States Circuit Court of Appeals for the Ninth Circuit. Elizabeth Decker, Appellant, vs. The Pacific Coast Steamship Company (a Corporation), Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed February 14, 1908.

F. D. MONCKTON,
Clerk.

NO. 1564

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ELIZABETH DECKER,

Appellant,

vs

THE PACIFIC COAST STEAMSHIP COMPANY,
a Corporation,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

E. M. BARNES, Attorney for Appellant

The Transcript Press, Juneau, Alaska.

NO. 1564

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ELIZABETH DECKER,

Appellant,

vs

THE PACIFIC COAST STEAMSHIP COMPANY,
a Corporation,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

E. M. BARNES, Attorney for Appellant

The Transcript Press, Juneau, Alaska.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH DECKER,

Appellant.

vs.

THE PACIFIC COAST STEAMSHIP COMPANY, a corporation, and JOHN JOHNSTON,

Appellee.

STATEMENT OF THE CASE.

This is an action commenced by the appellant against the defendant corporation to abate a private nuisance. The defendant John Johnston, being equally interested with the appellant but refusing to sue with her, she made him a defendant under the laws of Alaska.

Appellant alleged herself and the defendant John Johnston to be the owners in fee simple absolute of Block L, Town of Juneau, against which the tide regularly ebbs and flows, that between said premises and deep water the defendant corporation now

maintains, and for more than ten years last past has maintained, buildings and a wharf. That defendant will continue to maintain said buildings and wharf to plaintiff's irreparable damage unless said buildings and wharf are abated by this Honorable Court and that by said maintenance appellant and her co-tenant have been during all of said time deprived of and prevented from wharfing out or maintaining a wharf in front of their said premises, and prevented from access to deep water or at all from their abutting premises described in appellant's complaint, which is a private, direct, irreparable and material damage to plaintiff and her co-tenant and they have thereby been damaged in the sum of one thousand dollars, and that said maintainance of said wharf and building by said defendant corporation is a private nuisance to plaintiff and her co-tenant and plaintiff prayed judgment for herself and her said co-tenant in the sum of one thousand dollars, and for her costs and disbursements and that said building and wharf be abated.

Defendant corporation admitted its corporate capacity, admitted plaintiff's ownership of the premises described in plaintiff's complaint, and that the said premises abutted on the waters of Gastineaux Channel at mean high tide, as alleged in plaintiff's complaint. Denied that defendant corporation maintained the buildings and wharf referred to in any other capacity than as lessees, or that said building or wharf is a nuisance, and plead as a separate defense the laches of plaintiff in maintaining this

action, set up an alleged quit-claim deed by plaintiff and her grantors while the United States was the owner of the premises, of all the littoral or appurtenant rights that they then owned or might thereafter exist between ordinary line of high tide and deep water, to the People's Wharf Company, a corporation, except a warehouse building, said defendant showing that Franklin Street lay between said premises and the shore of Gastineaux Channel, and thereafter the Pacific Coast Company, a corporation, duly purchased for a valuable consideration, in good faith and without notice of any claim whatsoever of the plaintiff or her grantors, the premises described in the said deed of February 20, 1897, together with the rights therein contained and incident thereto. That the People's Wharf Company and their successors in interest, erected valuable improvements on said property (the littoral and appurtenant rights) (Record, p. 11, par. 1, lines 10, 11 and 12) lying between Blocks K and L and deep water, and that the defendant corporation being the lessee of the Pacific Coast Company, is not the real party in interest and therefore there is a defect of parties defendant. Appellant replied denying that she or her grantors or any other person or at all by due or proper conveyance, or at all conveyed to People's Wharf Company, or any other person, or at all, any littoral or appurtenant rights or any part thereof then or that might thereafter exist in or to the shore of Gastineaux Channel, or at all, between any line of high tide or deep water or at all in the Town

of Juneau or any other place, or that said People's Wharf Company was or is a corporation or that any deed conveying said property was ever witnessed, acknowledge, signed or executed by any of said parties or filed for record at any time or that the said premises or rights or any part thereof under said deed or at all were ever purchased in good faith or at all or in reliance on any deed by John J. Waterbury or any other person or that the Pacific Coast Company, a corporation, ever purchased or at all for any consideration or at all said property, or rights, or any part thereof without notice or at all at any time or that the wharfs or other improvements were erected except as alleged in plaintiff's complaint and that they do not exceed in value $1,500.00 or that defendant is not the real party in interest or that there is any defect of parties. That up to October 5, 1898, the land mentioned herein was the exclusive property of the United States of America and was not owned by private persons or subject to private ownership. That at no time until the year preceding the commencement of this action was plaintiff informed of any of her rights herein. That she is a woman and at all times relied on the advice of hired counsel and none of them until the past year ever informed her of any of her rights herein and previous to said time she had at almost all times since her majority been a married woman.

The trial court found as facts that plaintiff did by due and proper conveyance quit-claim and convey to the People's Wharf Company, grantor of defend-

ants lessor, all the littoral rights immediately abutting on said Block L and that through mean conveyances the lessor of the defendant corporation is and now was the owner, in the possession by its lessee, the defendant corporation, and entitled to the possession as against all persons save its lessee and the United States of all of said premises at the commencement of this action and that plaintiff had no right, title or interest in or to any of the littoral or riparian rights or tide land immediately abutting on and in front of Blocks K and L (the littoral rights to Block K were not in controversy) and that plaintiff had permitted the defendant corporation's lessor to erect improvements of the value of $18,000.00 without objection, claim or notice of equity on her part to said premises, and that the defendant lessee is not the real party in interest, it being simply lessee of the Pacific Coast Company and as conclusions of law the trial court finds:

The Pacific Coast Company lessor of the defendant, the Pacific Coast Steamship Company is as against all persons except the United States the owner of the premises described herein, and was such owner at the commencement of this suit and at all times since the commencement thereof.

The judgment of the trial court is that the Pacific Coast Company is the owner of, in possession of, and entitled to the possession of the premises described in the complaint herein at the time of the commencement of this action and long prior thereto was such owner of said premises, and that the plaintiff had

no right, title or interest in or to said premises, or any portion thereof at the time of the commencement of this action.

In the Court's opinion it says: The plaintiff with defendant John Johnston now owns Block L and further that there are three questions decisive of the case:

First—The defendant corporation being but the lessee of the Pacific Coast Company is not the real party in interest.

Second—That the quit claim deed above referred to did effectually convey any right which plaintiff then held as possessory owners, or which she might thereafter acquire as patentee of those premises from the United States, and

Third—Plaintiff was estopped from questioning these acts after the long lapse of time.

Appellant takes the position:

That a quit-claim deed conveys no after acquired rights.

That a littoral right is appurtenant to the land, goes with it and cannot be severed from it.

That in actions to abate a nuisance the party who continues it, as well as the party who erects it, is equally liable—the tenant as well as the landlord.

That in actions of this nature there can be no laches on part of plaintiff. Each day's continuance of a nuisance is a fresh one.

That neither the defendant corporation nor its lessor nor its lessors grantor ever had any more right, title or interest or now has any more right,

title or interest in or to the littoral rights appurtenant to the premises in said complaint named than does a jack rabbit.

ARGUMENT

That this judgment is erroneous because not supported by the pleadings.

As to Assignment of Error XVII.

The Court erred in rendering its decree herein "That the plaintiff had no right, title or interest in or to said premises, or any portion thereof, at the time of the commencement of this action" and the Pacific Coast Steamship Company is the owner of, in possession of and entitled to the possession of the premises described in the complaint herein as against all persons except the United States, and that the said Pacific Coast Company was at the time of the commencement of this action and long prior thereto, such owner of said premises.

In no place either in the decision of the Honorable Trial Court or its conclusions of law or judgment is a single authority quoted.

"Premises mean land and tenements."

Robinson vs. Mercer County Mut. Ins. Co., 27 N. J. Law (3 Dutch.) 134-141.

Howard Fire and Marine Ins. Co. vs. Cornick, 24 Ill. (14 Pick.) 455.

Carr vs. Roger Williams Ins. Co., 60 N. H. 513-520.

Craft vs. Indiana D. & W. Ry. Co., 46 N. E. 1132-3

Sandy vs. State, 60 Ala. 18, 19.
Thompson vs. Brown, 73 N. W. 194-5.
State vs. French, 22 N. E. 108.
Heming vs. Willetts, 7 C. B. 709-715.
Winlock vs. State, 121 Ind. 531-533.

Not a scintilla of evidence to support this judgment.

Not a word of pleading to support it and the admissions in the pleadings are equally against it.

It is true Finding III. is to that effect. Record, p. 3.

But appellant excepts to the sufficiency of the evidence to support said finding.

Record, pp. 96 and 101.

"This Court cannot presume that the trial court required or permitted evidence to be introduced on the trial for the purpose of establishing or rebutting allegations of the complaint not denied by the answer; nor can it be presumed that any evidence was received by the trial court, except such as was pertinent to the issues made or tendered by the pleadings, and evidence tending to rebut such legitimate evidence."

Gregory vs. Nelson, 41 Cal. 287.

"Any finding or judgment of the court repugant to the facts admitted by the pleadings is erroneous."

Idem.

It is alleged in plaintiff's complaint that she and defendant Johnston "now are the owners in fee simple of Block L of the Town of Juneau, Alaska, according to the recorded map or plat thereof, of record

in the recorder's office at Juneau, Alaska."

Record, p. 3.

This is not denied. The Court in its opinion says "The defendant Johnston is the joint owner with the plaintiff of Block L of the town of Juneau."

Record, p. 18.

"The plaintiff, who with the defendant John Johnston now owns Block L, derives her title through Edward O. Decker, her deceased husband.

Opinion of District Court, Record, p. 21.

Town trustees patent to J. M. and E. O. Decker for said premises.

Record, pp. 40 to 46.

Deed J. M. Decker to John Johnston.

Record, p. 46.

The court in the settled bill of exception says "it is admitted by the pleadings that plaintiff and John Johnston are owners of the '*premises*' as described in the complaint."

Appellant would most respectfully call the court's attention to the fact of the presentation of the bill of exceptions on October 29, 1907, and to the rule of the trial court and ask is it good practice to keep an appellant waiting from October 29, 1907, to January 6, 1908, for the court to settle the bill of exceptions.

Record, p. 97.

Appellant here calls the court's attention to a mistake of the printer in his black face sub-head on p. 55 of Record: "Deed Edward O. Decker et ux. to Jay M. Decker et al." It should be J. M. and E. O. Decker et ux. to People's Wharf Company, and further

to the wording of that deed: "We do, as owners of said lots K and L, the same abutting upon Franklin Street in said city, the said street running along the line of ordinary high tide, being the shore of Gastineaux Channel, in said town of Juneau, and we do as such owners grant to the said party of the second part and forever quit-claim to them all littoral and riparian rights appurtenant thereto if any that we may now have or that may hereafter exist for any cause whatsoever in our favor, our heirs, administrators or assigns."

Record, p. 56.

The deed fully and fairly shows that Franklin Street lay between Block L and Gastineaux Channel, and this deed was accepted by the named grantee. It is fair to presume that if Franklin Street had not lain between Block L and Gastineaux Channel this appellant would not have signed it; all the grantees got at that time is nothing. I will not burden this record with authorities in support that where a street intervenes between the upland and tide water no littoral rights attach to the upland.

The Honorable Trial Court says:

"The evidence adduced on the trial shows that Blocks K and L did abut upon tide land."

Record, p. 19.

There was no evidence offered on the trial concerning that point except the map, the deed and map spoke for themselves and the pleadings admitted that at the commencement of this suit "That said premises abut on the waters of Gastineaux Channel at

mean high tide and against which premises the tide regularly ebbs and flows twice in twenty-four hours."

Allegation IV. Record, p. 3.

Allegation IV. Record, p. 10, and there is no pleading that at any other time they did so abut, appellant submits that the Honorable Trial Court is mistaken and the mistake is against plaintiff appellant. It says:

"The evidence nowhere discloses any change in the relative position of Block L and the tide land between the time of the giving of the deed and the commencement of this suit."

Record, p. 21.

The Court further says: "It is a well-settled rule of law that whenever a nuisance exists upon the premises at the time of letting, the landlord by letting the premises in such condition, consents to the continuance of the nuisance, and is liable to all injuries to third persons from its continuance by the tenant."

Record, p. 21.

"That the holder by possessory title or a patent may exercise that (littoral) right, or give the rights to some other is beyond question, and has been held so in repeated instances."

Record, p. 22.

A Judge stood waiting at Peter's gate,
Pete said: "You know I lawyers hate,
But you've been judge, give me your paw,
When you made decisions, you quoted law."

It's too elementary to quote authority that a lit-

toral proprietor has the right to wharf out.

Expressio unius est exclusio alterius.

Under the Honorable Trial Court's definition of a littoral right what more did the grantees buy than the right of ingress and egress? They certainly bought no right to erect "stores and shops."

The Court finds as a fact "the said People's Wharf Company and their successors in interest, have erected upon said tide land valuable improvements in the shape of stores, shops."

Record, p. 32.

The most they bought, if anything, was a littoral right, and under no definition of a littoral right does it include a right to erect stores and shops on the tide land, and those stores and shops should be abated, even granting they purchased the littoral right.

The grantee, People's Wharf Company, corporation, predecessor in interest of the defendant corporation, fully realizing that a grant of the littoral right without a grant of the upland is a—was a nullity, in their pretended conveyance of said littoral rights convey as follows: "That whereas the said party of the first part is a corporation duly incorporated and existing under and by virtue of the laws of the State of Oregon and in pursuance of the statute in such cases made and provided, has acquired and is the owner of a certain wharf structure, warehouses thereon situated and is the owner of the land abutting upon the shore to which said wharf structure is appurtenant."

Record, p. 63.

meaning Blocks K and L, they refer to the map and the map shows Blocks K and L to be abutting at that time on Franklin Street.

Record, pp. 66 and 68.

This is the inception of their title to the premises "described in the complaint" and it's all the evidence they have, save and except the decree of the Honorable Trial Court decreeing they own it, which decree appellant asks to be reversed. And is not appellant's exception to the decree well taken?

Appellant confidently asks that her exception to the sufficiency of the evidence to sustain finding III

Record, pp. 30 and 31

be sustained.

Record, pp. 95 and 101.

Assignment of errors IV.

Record, p. 99.

The deed of J. M. Decker, E. O. Decker and his wife to People's Wharf Company was incompetent evidence for this: Congress alone has power to make grants below high water in any territory of the United States.

It appears from the deed that Franklin Street was between the upland and ordinary high tide.

The deed is a quit-claim. At the time of making it all the land in Alaska belonged to the United States and a quit-claim deed only conveyed the interests which the grantor possessed at the time of making the deed, which appears from the deed and from what the Court takes judicial notice of, to be nothing.

The right to erect and maintain a wharf cannot belong to any person save the littoral proprietor, which by the admission of the pleadings is the plaintiff

No rights to wharf out can be conveyed without a conveyance of the land itself. The wharf right cannot be destroyed by an attempted grant thereof to a stranger.

The ownership of the land is a necessary incident to the erection of a wharf.

The rights of the littoral owner cannot be detached from the soil out of which they arise or to which they are incident, and therefore cannot be transferred without an actual conveyance of the soil itself. A purchaser by a quit-claim deed is not a bona fide purchaser and has no rights to the after acquired title of the grantor in a quit-claim deed.

The proposed evidence was also immaterial. "Congress alone can grant tide lands in the territories."

U. S. vs. Winans, L. Ed.

Horace W. Carpentier claimed the right to erect and maintain wharves on the water front of the City of Oakland, Cal., because of a deed granting those rights and also granting the tide land. The corporation (City of Oakland) had no power to aleinate these lands unless such power was conferred by the legislature * * * Carpentier had no rights and the deed was void."

Southern Pac. Co. vs. Western Pac. Co., 144 Fed. 179.

And by the same reasoning the alleged grant to defendant's grantors is void.

At the date of the deed under which the defendant's lessor holds, 1897, Alaska was under the Oregon law, and under the Oregon law then, the abutting owner had no right to wharf out, nor possessed any littoral rights.

Hinman vs. Warner, 6 Or. 408.
Parker vs. Taylor, 7 Or. 435.
Parker vs. Rogers, 8 Or. 183.
Shively vs. Parker, 9 Or. 500.
McCann vs. Oregon R. & Nav. Co., 13 Or. 455.
Laws of Oregon 1874, p. 76.
Bowley vs. Shively, 22 Or. 410.
Laws of Oregon 1872, p. 129.
Shively vs. Bowley, 38 Law Ed. 350.

No one but the littoral proprietor can acquire or own the littoral right.

With great confidence I refer this court to San Francisco Sav. Union vs. R. G. R. Petroleum & Min-Co., 77 Pac. 823 *et seq.*

Inter alia the Supreme Court of California says: "That no one else can acquire or own it (the littoral right), gives the abutting owner that dominion which enables him to protect it for the benefit of his own property which he has located, occupied and improved under the express assurance to some extent, and the implied assurance to a greater extent that individual interference shall not disturb him from the ocean side. Whatever unlawfully obstructs the free use of this property or unlawfully obstructs

the free passage of egress or ingress to and from it, is a nuisance. While this is a decision from a state court, the high standing of the author, and based as it is on United States decisions appellant confidently expects serious consideration therein."

"He cannot convey upon another the right of a riparian owner without a conveyance of the soil upon the margin of the stream."

Wood on Nuisances, p. 420, par. 343.

"That a right to erect and maintain a wharf cannot belong to any person save the littoral proprietor. It is appurtenant to the abutting land, the riparian right is as much property and is as valuable as any right possessed by the owner of the upland, and it can no more prevent his wharfing out by an attempted grant of it to another person than it can prevent him from building on his upland. The state, if it was for the public good, might forbid the riparian owner to exercise his wharf right. But when the wharf right is destroyed by an attempted grant to a stranger the property rights of the owner of the upland are taken in violation of the constitution, and any decision which sanctions such a proceeding is fundamentally wrong."

Farnham, pp. 546 and 548.

What would that learned writer write concerning a decree which not only destroys the wharf right but the right to the upland also, as does this decision?

"The rights of riparian owner cannot be detached from the soil out of which they arise, and to which they are incident and therefore cannot be transferred

without an actual conveyance of the soil itself."

Wood on Nuisances, Vol. 1, p. 421.

"Owner has exclusive right to build wharf."

Idem, p. 669, par 491.

"The right of wharfage remained appurtenant to it, because as land adjacent to the river that right was annexed to it by law, and could be exercised on it by the proprietor. * * * Defendant must show a conveyance of the locus in quo, as parcel, a claim as an appurtenant and not in locus in quo must fail * * The right to wharf belonging only to land bounded by the water, the right which a riparian proprietor has with respect to water are entirely derived from his possession of land abutting on the river."

Potomac Steamboat Co. vs. Upper Potomac Steamboat Co., 109 U. S., 27 Law Ed. 1074.

The riparian rights are incident to riparian ownership, exist with such ownership and pass with the transfer of the land.

Ill. C. R. R. Co. vs. People of the State of Ill., 36 Ill. 1040.

"If he grants away a portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights. * * * The right of wharfage is appurtenant to it.

Potomac Steamboat Co. vs. Upper Potomac Steamboat Co., supra.

My neighbor, the owner of the apex, has a right to pursue the dip of his vein into my ground and beyond. Why? Because he is the owner of the

apex. Can be convey that right to another without conveying the soil? The answer is axiomatic.

The owner of abutting land has the right to wharf out. Why? Because he is the owner of the abutting land. Can he convey that right without conveying the soil? Is not the answer equally axiomatic?

The quit-claim deed conveyed no after acquired right.

"A quit-claim deed only conveys the interest which the grantors possess at the time of making the deed."

Baker vs. Woodward, 12, p. 11.

"Quit-claim deed conveys nothing and grontor can acquire subsequent valid title."

Devlin on Deeds, Vol. 1, par. 27.

"It is urged on behalf of appellant that the rule is well settled that a mere quit-claim deed of the right, title and interest of the grantor does not estop him from asserting an after acquired title, which is absolutely correct."

Dorris vs. Smith, 7 Or. 276.

Baker vs. Woodward, 12 Or. p. 11.

"A deed of quit-claim does not operate to pass an interest not then in existence."

Van Rennssel vs. Kearney et al., 11 How. 322.

"The operative words of a quit-claim deed are release, remise and quit-claim, and such deeds purport to convey and does convey, no more than the present interest of the grantor, and does not operate to pass an interest such as may afterward vest."

Morse vs. Cohauned Bank, 3 Story 365.

Bragg vs. Poulk, 42 N. E. 517.

Webster vs. Webster, 33 N. H. 226, 6 Am. Dec. 705.

Givan vs. Doe, 7 Blackb. 212.

Hannon vs. Christopher, 34 N. J. Eq. 459.

"No estoppel can in general arise from a deed of quit-claim."

San Francisco vs. Lanton, 18 Cal. 465, 79 Am. Dec. 187.

Rogers vs. Burchard, 34 Tex. 441, 7 Am. Rep. 283.

"A purchaser who acquires his title by a quit-claim deed cannot be regarded as a bona fide purchaser without notice, but takes only such title as the grantor can lawfully convey."

McAdow vs. Black, 6 Mont. 601.

"Grantee by quit-claim, without warranty, is not entitled by force of his deed to after acquired title."

Smith vs. Washington, 88 Mo. 601.

Fay vs. Wood, 65 Mich. 390.

"A purchaser by quit-claim cannot be regarded as a bona fide purchaser without notice, in such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey."

May vs. Leclaire, 20 Law Ed. p. 53 and citations.

"Where grantor had no title his quit-claim passed none."

Dunn vs. Barnum, 51 Fed. 361.

Assignment of Error No. XXII.

Record, p. 102.

The court erred in making the finding that defendant corporation is not the real party in interest.

"When promoter commits nuisance and company continues it the company is the proper party."

10 Cyc. 269.

"Every continuance of a nuisance is held to be a fresh one."

Balt. & P. R. R. vs. 5th Bap. Church, 34 L. 788, 137 U. S.

"An action for nuisance will lie against the tenant even though there was no notice of abatement."

Whiteneck vs. Phil. R. R. Co., 57 Fed. 501.

"In actions for nuisance the tenant is liable."

Wood on Nuisances, p. 332, par. 269.

"An action will lie against one erecting a nuisance and one continuing a nuisance erected by another."

Stople vs. Spring, 10 Mass. 72.

Defendant introduced the equitable defense of laches of plaintiff in his answer.

Par. II. and 11., Record, pp. 12 and 13.

The court in its opinion found the plaintiff was estopped through her laches.

Record, p. 23.

"That the plaintiff herein is the widow of said E. O. Decker, and during all of said time since the 20th day of February, 1897, has allowed improvements of great value from time to time without objection, claim or notice of equity on her part to said premises."

Finding No. VI., Record, p. 32.

Her deed was duly recorded during all that time

and what more notice need she give?

Record, pp. 43 and 47.

At any rate

"Prescription of whatever length of time will not justify a nuisance. Every day's continuance is a new offense."

The Northwestern Fertilizing Company vs. Village of Hyde Park, Chauncey M. Cody et al., 24 L. Ed. p. 138.

As to Assignment No. 1.

The question asked Mrs. Decker: "How much, if any, you have been damaged by the maintenance of those buildings on that property by the Pacific Coast Steamship Company as described in the answer?"

Record, p. 39.

Did not require an expert to answer, she could not answer unless she knew. The court sustained the objection because "no proper foundation had been laid to justify or enable the court to determine whether or not this witness is competent to testify as to any damage suffered."

Record, p. 39.

Does it require any peculiar fitness to answer such questions? If not the objection was improperly sustained.

As to Assignment No. II.

"Have you some knowledge, Mrs. Decker, of the amount of freight that you would probably be able to handle over your wharf provided you had a wharf?"

Defendant's objection because question is incompetent, irrelevant and immaterial, speculative and not the proper way to prove damages.

Record, p. 52.

Plaintiff was not trying to prove damages, a preliminary question only, to qualify witness, she had been precluded from answering the first question because she was not qualified and was refused the privilege of qualifying herself to answer the second question, which she submits is error.

As to Assignment No. III.

The question: "Do you know, generally, Mrs. Decker, from common repute and what you see in the newspapers, that the charges by these wharf companies here in Juneau are excessive?" To which defendant objected because incompetent, irrelevant and immaterial, and the answer to which would tend in no way to show how much the plaintiff is damaged by the maintenance of the structure on the premises. It was not asked for the purpose of proving damages but certainly is an element that should be received in evidence. If by common repute the other wharf rates were excessive that was an element that tends to show that had she a wharf and made reasonable charges she would do a business. A man would be justified from newspaper reports and common repute in believing it would pay to invest in a water system in San Francisco that would bring pure water to the inhabitants thereof, or in investing in a dairy that would furnish pure milk to said city and if one able and willing to so invest was prevented to so in-

vest, was prevented by some butter in, would there in such case be any question as to the admissability of such evidence?

As to Assignment VI.

In admitting the deed from People's Wharf Co. the trial court erred for this: Said deed referred to the map attached, this map shows Franklin Street there the same as described in the deed of this plaintiff, which deed states it lies between Blocks K and L and the shores of Gastineaux Channel.

Record, p. 56.

The map shows the deed spoke the truth, which conclusively shows there were no littoral rights at that time, Franklin Street intervening between Blocks K and L and tide water. If the People's Wharf Company did not buy any littoral rights neither did their grantees, yet the court in its opinion says the evidence adduced at the trial shows that Blocks K and L did abut upon the tide land. Evidently the court was mistaken, but all its mistakes seem to appellant to be against this widow. With this evidence before this Honorable Court is she asking in vain to have Assignment VI. sustained?

For the same reason she asks that Assignment VII. be sustained, because the People's Wharf Co., having no littoral rights to Block L, could transfer none to John J. Waterbury and T. Jefferson Coolidge, Jr.

In Assignment VII. the assignment should read: "The court erred in admitting in evidence by defendant, against the objection of plaintiff, a deed from

John J. Waterbury and T. Jefferson Coolidge, Jr., to the Pacific Coast Company."

Record, p. 69.

And appellant's contention is that for the same reasons this assignment should be sustained.

In Assignment XIV.

The court erred in sustaining the defendant's objection to the question asked the witness Swan by plaintiff: "There is a building immediately abutting on the Decker building and not shown on the map, was not that building erected against the protest of the plaintiff in this case?"

Record, p. 91.

The witness Swan was asked by defendant on direct examination: "I will ask you if you know the value of the structures including the People's Wharf in front of Block L, as you have described?"

Record, p. 83.

Defendant in his answer alleged that plaintiff had stood by and seen defendant and its predecessors erect valuable improvements without objection on her part.

Record, p. 13.

The court in Finding VI. finds that at all of the said time since February 20, 1897, the plaintiff has allowed improvements of great value from time to time to be placed upon said premises without objection, claim or notice of equity on her part to said premises.

Record, p. 32.

And this finding as to values was based on tenant's

testimony.

In Finding V. the trial court finds the value of those structures to be $18,000.

Appellant submits she had a right on cross-examination of the defendant Swan to discredit his testimony by showing that the most valuable of all the buildings was erected against plaintiff's protest. The direct testimony was offered to show as the trial court suggested the laches of the plaintiff in allowing defendant to go on and spend all this money.

Record, pp. 83 and 84.

And is there any rule of examination that prevents us on cross-examination to show a different state of facts?

Probably the trial court did not consider the cross-examination of the witness Swan. On direct examination he testified to the $18,000, as found by the trial court.

Record, p. 84.

The premises in question herein in Block L, when asked on cross-examination he testifies the value of that in front of Block L is worth about $7,000.

Record, p. 85.

Then on pp. 88 and 89 he reduces the $18,000 to $1,600 and still the court finds in Finding V. on p. 32, that the buildings, etc., were worth approximately $18,000. As it strikes appellant there is another mistake against this widow.

Appellant does not contend that findings as to the values named is material or will support the decree, as stated before, the granting of the littoral right

did not grant the right to build stores and shops and the values proven relate to the buildings which the trial court finds are stores and shops.

As to Assignment XII.

The court erred in permitting the witness Swan to answer the question: "I will ask you what is the value of all the structures that have been described in front of Lot L, including the People's Wharf?" The answer shows one of the buildings was a warehouse belonging to plaintiff.

Record, allegation 1, p. 11.

And surely its value was not a proper question in this suit, for defendants to prove again the object of the question was to show plaintiff's laches.

Record, p. 84.

And appellant still believes the question was immaterial.

Assignment V.

The court erred in admitting in evidence by the defendant, against the objection of plaintiff, as to its competency, certified articles of incorporation of the People's Wharf Co., certified by the Recorder of Juneau recording district to prove its corporate existence.

The alleged copy shows that it was, if anything, a corporation incorporated under the general laws of Oregon, 1897.

There was no provision of law in Alaska for incorporation under the general laws of Oregon.

The statute of Oregon requires one copy to be filed with the Secretary of State of Oregon and one copy

to be filed with the County Clerk of the county in Oregon where the principal place of business of said corporation is, and the third filed with itself. None of these prerequisites appear to have been done.

It further provides, the only evidence of the proof of a corporation incorporated under the general laws of Oregon shall be a certified copy of the one filed with the Secretary of State in Oregon or the County Clerk of Oregon or the articles itself.

The production of the articles of incorporation alone (a portion of the copies certified by recorder) is not sufficient proof of the fact.

There is no finding that it was a corporation.

"A corporation is not legally in existence so as to be capable of making a contract, till its articles are filed with the Secretary of State."

Schreyer vs. Tiernan Flouring Mills Co., 29 Or. 1.

"The statute provides how a corporation may be formed and organized, and prior to its lawful creation it is idle to think of its entering into contractual relations."

Idem, p. 5.

"In the methodical order of offering the necessary evidence it would seem proper to prove the execution and acknowledgment of the articles of incorporation in triplicate, and that one of such articles had been filed in the office of the Secretary of State and another in the office of the Clerk of the County where the business is proposed to be conducted. * * * The articles of incorporation, unsupplemented by

other proof, were, in our judgment, inadequate to prove the existence of the plaintiff as a corporation."

Goodale Lumber Co. vs. Shaw, 41 Or. p. 548.

Affirmed in U. S. Mort. Co. v. McClure, 41 Or. p. 201, in an opinion by His Honor Justice Wolverton.

None of these requirements were met by the defendant corporation and yet against the objection of plaintiff as to its competency this copy of articles of incorporation certified to by the Recorder of Juneau recording district only

Record, pp. 59, 60 and 61

Was received by the Honorable Trial Court and this widow believes she was deprived of the inheritance left by her husband thereby.

If there was no People's Wharf Co. corporation then there can be no grantor to the Pacific Coast Co. corporation, and if there is no grantor to the Pacific Coast Co. corporation then there is no lessor to the Pacific Coast Steamship Co. and falls all the defenses interposed by the defendant corporation; sending this cause back for trial would avail them nothing, and appellant urges upon this court to issue a mandate directing the Honorable Trial Court to enter a judgment directing this nuisance to be abated.

Defendant has interposed the equitable defense of laches on part of plaintiff. Equity discountenances forfeitures. The record is silent as to how long plaintiff has been in a position to maintain this action. The court finds that she derives her title through her deceased husband, E. O. Decker.

Record, p. 21.

And will equity supply the gap and confirm this forfeiture of her rights?

He who seeks equity must come with clean hands, and does a trespasser's hands ever get clean?

The only rights they claim are claimed to be purchased from a corporation that has, as appellant believes, no legal existence.

There are many other assignments of error in the record, but believing enough has been shown to warrant this court in issuing its mandate as prayed for appellant at this time brings no more to the attention of this Honorable Court.

Why the District Court entered such a judgment is more than appellant has been able to fathom. It's against the pleadings, evidence, admissions of counsel and opinion of court; and owners of property here, not having the price of an appeal are standing aghast fearful to essay the checking, the graspings of this giant corporation lest their own be taken from them and adjudged the property of the corporation without that fact being litigated. Is not this the taking of property without just compensation or due process of law?

The record shows appellant speaks advisedly when she refers to the graspings of this giant corporation. What they purchased is detailed above and is shown in

Record, pp. 55 and 56.

Those composing the People's Wharf Company knew, under the law, that they had no rights under

the law; they knew they were purchasing no littoral rights when their deed described Lot L as abutting on Franklin Street. The Pacific Coast Co. corporation in its pretended purchase, under the law knew it was dealing with a mythical corporation when the description in the deed was qualified by the map and the map shows Block L to be abutting on Franklin Street; it knew, under the law, nothing was attempted to be conveyed, the defendant, the Pacific Coast Steamship Co., defendant corporation, when it made and pleads the pretended lease it, under the law, knew it was leasing from a trespasser and has the hardihood to come into court and interpose equity to support its trespass. Is not this grasping? Those pioneers who came to Alaska, blazing out an empire that some day will startle the world with its richness, in their honest endeavor to accumulate property that their loved ones left behind may live from the fruits of their labors, little thought that, when their lips were closed in death, a court acting on its equitable side, would wrest from those for whom they had struggled, and give, perhaps the widow's mite, to a corporation, its fountain head an illegal body of men acting as a corporation. So is it any wonder that this decision points its signals of danger to those unlearned in the law, and who believe their rights secured, as does this plaintiff believe, by United States grant? There have been many times when those unlearned in the law, fancying they feel the uncertainty of the law's protection—protect themselves; there have been times when the passions of

those unlearned in the law, and feeling themselves oppressed, turned the white snow into streaked red, while pitying, outraged equity stood weeping at her defiling.

We who read the decisions of this Honorable Court see shining beacon lights beckoning to us a haven, where if wrongs we have they will be righted.

Respectfully submitted,

E. M. BARNES,

Attorney for Appellant.

No. 1564

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

ELIZABETH DECKER,

Appellant,

vs.

PACIFIC COAST STEAMSHIP COMPANY (a corporation),

Appellee.

APPELLEE'S BRIEF.

GEO. W. TOWLE,
Attorney for Appellee,
Pacific Coast Steamship Company.

Filed this.....day of May, A. D. 1908.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

FERNAU PUBLISHING CO.

No. 1564

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit.

ELIZABETH DECKER,
Appellant,

vs.

PACIFIC COAST STEAMSHIP COMPANY (a corporation),
Appellee.

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

This is a suit, as stated in the complaint (tr. p. 3), "to Abate a Private Nuisance". For cause of action plaintiff alleges that she, and one John Johnston who has refused to join with plaintiff in her suit, are the owners, as tenants in common, of certain upland, Block L, situate at Juneau, Alaska, and alleged to now border upon the navigable waters of Gastineaux Channel. That the defendant corporation has maintained and now maintains, in front of said lands, a wharf and certain buildings which prevent

the plaintiff from wharfing out or maintaining a wharf in front of said premises which wharf is a private, direct, irreparable and material damage to plaintiff and whereby plaintiff and her co-owner have been damaged in the sum of $1000 during the two years last past. And plaintiff's prayer is: that the decree of this Court be that said wharf be abated, and that she and her co-owner recover damages in the sum of $1000—her co-owner not claiming that the wharf should be abated nor that he has been so damaged.

For answer Pacific Coast Steamship Company alleges:

That it is in possession of the premises not as owner, but only as tenant of The Pacific Coast Company. That it did not construct any of the structures complained of, but that the same were all constructed by its lessor, The Pacific Coast Company, and the predecessor in interest of that company long prior to the lease of the same by defendant; and this under an express authority, or license so to do, given or granted by plaintiff and by her certain deed, duly executed, acknowledged and recorded, of date February 20, 1897, whereby "all littoral and appurte-" nant rights by them (plaintiff and her husband) " owned, or any littoral or appurtenant rights *that* " *might thereafter* exist, in and to the shore of Gas-" tineaux Channel between the ordinary line of high " tide and deep water in the town of Juneau, " Alaska"—that is, all such rights in front of Block

L—were conveyed to People's Wharf Company; and that all rights so granted or given have, by mesne conveyances of record, been vested in The Pacific Coast Company, a New Jersey corporation, which purchased the complained of structures that had been constructed by its predecessor in interest without any notice whatever of any adverse claim by plaintiff, and has since, with her knowledge, and without protest upon her part, expended large sums in the construction and maintenance of the structures complained of. That Pacific Coast Steamship Company is only a lessee of the premises from The Pacific Coast Company, *and is therefore not the real party in interest.* That there is a defect of parties *in that The Pacific Coast Company,* the owner of the property, *is not made a party to the suit.* And defendant's prayer is, that the suit be dismissed at the plaintiff's costs.

In her reply to that answer plaintiff denies that the littoral rights referred to were ever so conveyed, or were so purchased by The Pacific Coast Company; and denies that there is a defect of parties. Alleges that when the deed referred to was executed, to wit, on Feby. 20, 1897, the title to the littoral rights referred to was in the United States, and were not then a subject of private ownership. That she is a woman and has at all times relied upon the advice of hired counsel, and that not until within the year last past has her counsel ever informed her that she had any such rights as she now asserts.

The case was tried before the Court, and a judgment of dismissal entered. The Court's opinion is set forth at pages 18-23 of the record.

At page 21 the Court said: There are in this case three questions, any one of which is decisive.

First: Is or is not the Pacific Coast Steamship Company the real party in interest? And the Court's answer (page 21) is that Pacific Coast Steamship Company *is not* the real party in interest.

As to the second question, the effect of appellant's deed, the Court (page 23) held that it conveyed all littoral rights appurtenant to Block L of the lands of plaintiff; and *third,* that her long acquiescence in the use of the premises, by The Pacific Coast Company and its predecessor in interest, *had estopped her from now claiming that the wharf,*—which with her full knowledge and at large expense had been constructed and maintained for commercial use—*is a nuisance.*

FINDINGS OF FACT.

The Court found (page 32) that defendant, Pacific Coast Steamship Company is the lessee of The Pacific Coast Company; and that defendant has not erected any structure upon said premises and does not claim ownership of any such structure.

That plaintiff (pages 30-33) did by due and proper deed of conveyance quitclaim and convey to People's Wharf Company all her littoral and riparian rights

here in controversy, and that by mesne conveyances all rights so conveyed were vested in The Pacific Coast Company when this suit was commenced which company then was, and since had been, in possession of the same by its lessee Pacific Coast Steamship Company.

That (page 32) plaintiff has with knowledge thereof, and without protest, allowed improvements of great value to be placed upon said premises by those claiming a right so to do under her deed.

BRIEF ON BEHALF OF DEFENDANT.

THERE IS A DEFECT OF PARTIES, IN THAT THE PACIFIC COAST COMPANY WAS NOT MADE A PARTY DEFENDANT.

I.

The Pacific Coast Company is the sole owner of the structures complained of. If plaintiff's prayer were granted, the wharf and other structures by the Court declared to be a private nuisance and ordered abated, it is The Pacific Coast Company's property that would be so ordered to be destroyed. But the rule is imperative that no Court can make such an order until after the party to be so affected has been duly brought into, and has had his day in, the Court that is requested to so do.

Ribon v. The Chicago &c. Ry. Co. et al., 16 Wall. 446;

U. S. v. Central Pacific R. Co., 11 Fed. 449, 458;

Shields v. Barrow, 17 How. 130; 15 L. Ed. 158.

II.

Plaintiff is, by her deed, estopped from claiming any littoral rights in connection with her property—Blocks K and L in the town of Juneau. See deed, Decker and wife (the present plaintiff) of date Feby. 20, 1897 (pages 55-6) whereby plaintiff and her husband expressly granted to People's Wharf Company a right to erect and maintain a wharf in front of said Blocks K and L. Also deed by People's Wharf Company (pages 63-6) to Waterbury and Coolidge; and (pages 69-77) deed of Waterbury and Coolidge to The Pacific Coast Company, by which last mentioned deeds there was conveyed to The Pacific Coast Company all rights granted to People's Wharf Company by plaintiff's deed of February 20, 1897.

Plaintiff's idea (page 54) seems to be that: "The "rights of the riparian owner cannot be detached "from the soil out of which they arise or to which "they are incident, and therefore cannot be trans- "ferred without an actual conveyance of the soil "itself."

That is to say: that a right to construct a wharf in front of land having littoral rights may not be assigned or transferred, or a license so to do be given, save only by a conveyance of the title to property to which such wharfage right is attached.

Were that the fact, there could be no such thing as a valid easement of use in the property of another: No legal right to use lands for any purpose

unless the title to the land be transferred, in order that a use of it may be had.

It may be conceded that the owner of land bordering upon navigable waters has, by virtue of such ownership, a right of access to such water, and a right to maintain a wharf or pier extending therefrom out to the point (*Illinois Cent. R. Co. v. People,* 145 U. S. 387; 36 L. Ed. 1018) where such waters become navigable. But that right, like his right to mine in his land; his right to pass over a particular part of it; his right to use all or any part of it; may be parted with, may be granted, and he still retain legal title to all of his land. Surely a right of public or private way over land may be granted without granting a fee in the land subjected to such use: and a wharf, maintained from the shore out into navigable waters, is no more than a way. In this Case the owner of Blocks K and L, if those blocks fronted on tide water, had originally a right to maintain a way out to navigable water from the whole shore boundary of those blocks. By their deed, referred to, they parted with such right—granted it to their grantee—and The Pacific Coast Company now has that right to the full extent that plaintiff and her husband originally possessed or since may have acquired the same.

But, assuming that the position of plaintiff were correct; that is, that she could not convey such right; how then can she be heard to claim that what she expressly authorized to be constructed and main-

tained is, as to her, a private nuisance? that what she authorized to be done—what has been constructed at large expense in reliance upon her consent—shall be destroyed and at her sole behest? Her contention appears so monstrous that we are not at all surprised at the statement in her complaint, that not until within the year has she found hired counsel who would advise her that she has such rights as she here asserts.

That littoral rights may be conveyed, see *Farnham on Waters,* Vol. III, Section 724 (a), and authorities there cited.

24 American and E. Encyc. of Law, (2nd Ed.), p. 982.

Even under the English rules, the grant by the riparian owner was good as against himself—and that is all that is needed in this case, for here the only one complaining is the one who expressly granted a perpetual right to erect and maintain the wharf structure.

III.

Much stress is laid by appellant on the fact that the appellant's deed of her littoral rights was in the nature of a "quitclaim"; and therefore it is claimed that her deed would not affect an after acquired title. But her deed conveyed (quitclaimed) *not only the present rights of the grantors, but* also (tr. pp. 55-6) *"all right, title, interest and estate,* legal

"or equitable * * * to the shore of Gastineaux "Channel, *which we may now or may hereafter pos-* "*sess* by virtue of any law of the United States or "otherwise, *by reason of our now being the owners* "*of Blocks K and L in the town of Juneau* * * * "*And we further hereby grant* (not quitclaim) to "the party of the second part *the right to wharf out* "*from our said premises* southwesterly to deep "water and maintain wharves and warehouses "thereon for the benefit of commerce and to *own,* "*possess and occupy* the same forever *by itself and* "*its successors and assigns* * * * ."

We submit, the Court was entirely right when it found that all of appellant's littoral rights passed out of her by that deed.

IV.

Appellant contends that it was not proven that "People's Wharf Company"—the grantee in her deed—was a corporation. That question we do not deem material. Some one, using that name, negotiated with appellant and her husband regarding their littoral rights, and the result was that such rights were deeded to whomsoever was then using that name. It is immaterial whether it was John Smith alone who was so doing, or a number or persons who, in compliance with all of the formalities of law, had organized a *de jure* corporation. It is sufficient here that appellant did business with

whomsoever was using that name, and executed to him, them, or it, as the case may be, the deed referred to. Appellant having so done, she can not now defeat her deed by showing, if such were the fact, that there was in fact no such corporation; no more so than, if she had in fact negotiated with some one named John Jones, he falsely assuming for the occasion the name John Smith, she could defeat her deed by showing that there was no such person as John Smith. But here there is no proof whatever that People's Wharf Company *was not* a corporation—what appellant claims is only that there is no competent proof that *it was* a corporation. That it was a corporation may be inferred from (page 55) appellant's deed; (page 63) from the deed of People's Wharf Company, and again (pages 59-60) from a copy of the Articles of Incorporation. And whether or not the persons who so assumed to be a corporation had a right so to do can only be questioned by the state.

Appellant's deed conveyed her rights to some one, either a corporation or some one using a corporate name, and it is that person or that corporation only, not appellant, who may now question the right of The Pacific Coast Company to the ownership and possession of what was conveyed by that deed. Appellant having parted with her interest, granted to some one and his or its successors and assigns a perpetual right to construct and maintain the wharf; she is now a stranger to any question as to who it is that

may be entitled to possess that which she, by her deed, divested herself of.

At page 45 of the transcript it appears that the entry of the townsite of Juneau, pursuant to the Act of March 3, 1891, (26 St. 1095) was made on Oct. 13, 1893; and that the trustee deed, under that entry, was made to appellant and her husband on Oct. 13, 1893. Whatever littoral rights are now attached to those lands were therefore so attached on the last mentioned date, and were therefore all conveyed by the deed to People's Wharf Company (tr. p. 55) of date February 20, 1897; for there is nothing here to show any after acquired title to such rights by either appellant or her husband. If, as appellant claims, Blocks K and L, when her deed was executed, were bounded by a street—not by the waters of Gastineaux Channel—then her present rights would be only such as as attached when those blocks were so bounded. For it surely cannot be a fact that a later removal of the surface of the intervening lands, be it a street or otherwise, would divest the littoral rights of the owner of those lands, or would give to the owner of lands so made to temporarily border on tide water any littoral rights whatever. Appellant's contention, that Blocks K and L were in 1897 bounded by a street, is therefore *felo de se;* for, at page 10 of her brief, her counsel says: "I will not " burden this record with authorities in support that " where a street intervenes between the upland and " tide water no littoral rights attach to the up- " land."

Appellant contends that Blocks K and L were bounded by a street, not by Gastineaux Channel, in 1897 when she executed her deed; but there is no evidence that such street has ever been abandoned, nor that appellant has acquired title thereto. What appellant in this connection relies upon (pages 10-11 of her brief) is the allegation of her complaint (p. 3), not denied, "That said premises (when the " suit was commenced) abut on the waters of Gas- " tineaux Channel *at mean high tide* and against " which premises the tide regularly (at mean high " tide) ebbs and flows twice in twenty-four hours". But the fact that *at high tide* the lands did then so abut is not evidence for or against the existence of a street between those lands and tide water—certainly not evidence that appellant had acquired littoral rights simply because tide waters were then, *at high tide,* permitted to so flow over such street.

Appellant's contentions, regarding a street and her littoral rights, come to this: If her lands were originally bounded by a street, not by tide water, she had and has no littoral rights: If her lands did originally bound on tide water, then she has parted with such rights: If, by reason of her ownership of said lands and as an incident thereto she has, for any reason, since acquired littoral rights, then those rights were conveyed by her deed which expressly conveyed (tr. p. 55) all such littoral rights as should thereafter attach to such lands, be they legal or equitable. So that in any view that may be taken of the situation of Blocks K and L, as abut-

ting on a street or on tide water, she has no present right to contest the right of any one to maintain a wharf in front of those lands. Much less, in view of her grant (tr. p. 56) of a perpetual right to maintain such a wharf, has she a right to here contend that such wharf, maintained for general commercial uses and therefore presumably extended far beyond the inshore limits of navigable water, shall be abated as a private nuisance.

In conclusion we respectfully submit that the fact that The Pacific Coast Company, the owner of the wharf, was not made a party to this suit is, in and of itself, a sufficient reason for the judgment of dismissal that was entered; and further, that appellant, by her deed, and by her long acquiescence, is estopped from claiming that the wharf structure is a private nuisance—that in any view that may be taken of her contentions, regarding the situation of Blocks K and L with reference to tide water, she appears to be without present interest in any littoral rights that ever were or now are connected with such lands.

Respectfully submitted,

GEO. W. TOWLE,

Attorney for Appellee,

Pacific Coast Steamship Company.

NO. 1564.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH DECKER, *Appellant*,

vs.

PACIFIC COAST STEAMSHIP COMPANY,
a corporation, *Appellee*.

APPELLANT'S REPLY BRIEF

E. M. BARNES,
Attorney for Appellant.

Filed this ..... day of June, A. D. 1908.

Clerk.

By.....*Deputy Clerk.*

The Transcript Press Juneau, Alaska

NO. 1564.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH DECKER, *Appellant*,

vs.

PACIFIC COAST STEAMSHIP COMPANY,
a corporation, *Appellee.*

APPELLANT'S REPLY BRIEF

E. M. BARNES,
Attorney for Appellant.

Filed this ..... day of June, A. D. 1908.

Clerk.

By.....*Deputy Clerk.*

The Transcript Press Juneau, Alaska

Oregon passed a law recognizing such sales, thus making it possible for such severance. An early Oregon decision, and on which subsequent decisions are based, gives that as the reason why such severance is there permitted.

"We are aware that it is a general rule that what is appurtenant to land passes with it, being an incorporeal hereditament, but the right to build a wharf on the land of the state below high water is a franchise which attaches to the tide land, and it is appurtenant to it rather than to the adjacent land, for it can be severed from the adjacent land and enjoyed without it. The legislature has established the right of the adjacent owners to sell the right of wharfing on the adjacent tide lands, by recognizing such sales and giving the owners thereof the preference to purchase."

Parker vs. Rogers, 8 Ore. 190.

If under the common law there could be a severance there would have been no necessity for the legislature of Oregon to so establish the right, and until congress so establishes such right in Alaska there can be no severance.

The citation cited by appellee on p. 8 of its brief, 24 *American and Eng. Enc. of Law* (2d ed.), p. 982, is to the point that the grant was good against the proprietor, but in the case at bar there was no littoral proprietor. And this Court takes judicial knowledge that the United States was the owner of the bed of water.

It strikes appellant that a crucial test as to whether

the littoral right can be severed from the land is:

Can it be sold under execution separate and apart from the land?

"So if a settler upon the public lands under the homestead law constructs a ditch for the purpose of conveying water onto his land for irrigation purposes such ditches and water rights become part of the realty and are not several therefrom, and are exempt from execution."

Faulk vs. Cook, 19 Ore., 455.

Appellant does not lose sight of the doctrine in 8th Ore., cited past, but that was made in pursuance to a statute of Oregon. This 19th Ore. is the judgment of the court unhampered by statute. In Alaska there was no such statute as governed the decision in 8th Ore., and the 19th Ore. is applicable to littoral rights in Alaska and the case at bar.

"The water rights pass appurtenant to the land."

Geddish vs. Parrish, 21 P. 314 (Wash.).

"The sale of the mill and transfer of the possession right to the land passes the water right to the vendee."

McDonald vs. Bear River Co., 13 Cal. 220.

Appellant acquired no title to Block L by the act of settlement, but only the right to one on her complying with the provisions of the law governing the sale and disposition of the lots of the City of Juneau. She had no title at the time of the deed to People's Wharf Co., February 20, 1897.

"When such a settler appropriates water for the necessary irrigation of the land occupied by him it

becomes as much a part of his improvements as his buildings or fences, and can be sold and transferred with his possessory right in the same way.

The principal subject matter of such a sale and purchase is the possessory right to the land and the consequent preference over others in the purchase of such land from the government. The water right being a necessary incident to the complete enjoyment of the land * * *

Hindman vs. Rizor, 21 Ore. 117.

The water right is appropriated by observing certain formalities of law, not necessary here to discuss.

The right to wharf out is a legal right dependent solely on littoral proprietorship, no act being necessary.

Appellant on becoming the littoral proprietor, unhampered by statute as in Oregon, had the same rights as had the settler in *Hindman vs. Rizor*, supra.

The condition at the time appellant's deed to the People's Wharf Company was that Franklin street intervened between Block L and the shores of Gastineau Channel.

"The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing to change materially the relative value of the respective parts."

Fremont E. & N. Valley R. Co. vs. Fayton, 67 Neb. 263, 93 N. W. 163.

Neither the People's Wharf Co. or any of its grantees can now claim more or different from what

is conveyed in the deed dated February 20, 1897.

"A reservation in a deed of upland along a tidal river of the water rights, privileges and grants appertaining to the land conveyed is ineffectual to reserve such rights if no grant to the land under the water has been obtained from the state."

Farnham, Vol. III, p. 2197.

The converse of the rule must be true, i. e. No grant of the water rights can be made if no grant to the land under the water had been obtained, hence the title to the land under the water being in the United States no rights were obtained by the People's Wharf Company in deed of February 20, 1907, and none passed from them, and neither appellee nor its lessor or its lessor's grantor have any now or ever had any.

An examination of all the authorities on the "separation of riparian right from upland" as cited by Farnham all turn on the proposition "of such a separation conferring the ownership of the dater, so far as it ca nrest in an individual, upon the one who owns the bed of the stream."

Farnham, Vol. III., p. 724, and authorities.

As so often said herein, there is no ownership to the bed of this water.

Referring to the italics in lines 4 and 5, p. 9 of appellee's brief and particularly to the stars therein on p. 5, appellant will supply the part indicated by the stars in said line 5, "*as laid off and platted by G. W. Garside and we do, as such owners of said lots K and L, the same abutting on Franklin street in*

said city, the said street running along the line of ordinary high tide being the shore of said Gastineau Channel in said town of Juneau, and we do as such owners grant to the said party of the second part and forever quit claim to them all littoral and riparian rights appurtenant thereto if any that we may now have or that may hereafter exist for any cause whatsoever in our favor, our heirs, administrators or assigns."

Record, p. 56, lines 3 to 13.

If the grantors intended to convey littoral rights why did they qualify the grant by saying "if any that we may now have?"

Appellant contends that if anything, the deed shows clearly a quit claim to littoral rights not then in existence.

In sub. IV., p. 10, of appellee's brief all appellee claims is that appellant granted to some one and his or its successors and assigns a perpetual right to construct and maintain the wharf.

Eliminating appellant's claims and looking only to appellee's claims we find the only right they claim is "the right to wharf out from our (appellant's) said premises southwesterly to deep water and maintain wharves and warehouses thereon for the benefit of commerce and to own, possess and occupy the same forever by itself and its successors and assigns."

Appellee's Brief, p. 9.

Nothing was granted by this deed, appellant had not the right to wharf out, Franklin street intervened.

Deed, Deckers to People's Wharf Co. Record, p. 56.

Map. Record, p. 68.

The grantees could not own the same, as in Alaska tide lands are not the subject of ownership.

Hampton vs. Columbia Canning Co., supra.

Hence the People's Wharf Co. bought nothing and they have no complaint for they only paid one dollar consideration.

Record, p. 55, line 14.

Appellant's grantee granted no littoral rights to the premises described in the complaint, Block L (Allegation III., Record, p. 3), for in the deed it says:

"For a more particular illustration of the foregoing description reference is hereby made to the map or plat of the said premises which is hereto attached and made a part of this description and marked 'A.' "

Record, p. 65.

Turning to that map we find not only Franklin street, but several buildings between Block L and any possible water on the map or anything to indicate water in front of Block L, for some distance, the map having no scale, and it's appellee's map, appellant objected to its introduction (Record, p. 63). The exact distance to the "float ferry" (that being the first indication of water) cannot be given. The Pacific Coast Co. purchased no littoral right appurtenant to Block L. It purchased from the grantee of People's Wharf Co. (Record, pp. 69-78) and could purchase no more than its grantors had, thus falls appellee's claim that it is the Pacific Coast Company's property that will be destroyed (Appellee's

Brief, p. 5).

On p. 3 appellee urges the fact that The Pacific Coast Company has expended large sums on structures.

Appellant respectfully refers to her brief, p. 12: The Pacific Coast Company cannot complain as it bought only a quit claim right.

Record, pp. 69 and 70.

Appellee in its brief, pp. 7 and 8, says: "How, then, can she be heard to claim that what she expressly authorized to be constructed and maintained is to her a private nuisance?"

Can this Honorable Court, even by casting aside all appellant urges in her briefs, and relying solely upon appellee's brief, find that appellant ever authorized any stores or shops to be erected?

Appellee says such were erected (Allegation II., Record, p. 12).

On p. 11 of its brief appellee says: "And that the trustee deed, under that entry was made to appellant and her husband on October 13, 1893."

Continuing it says, on p. 11: "Whatever littoral rights are now attached to those lands were therefore so attached on the last mentioned date (October 13, 1893) and were therefore all conveyed by the deed to People's Wharf Company (Trans., p. 55) of date February 20, 1897; for there is nothing here to show any after acquired rights."

It is indeed a disagreeable duty to call the court's attention to wrong information given the court of a material fact by opposing counsel, which statement

if unchallenged might cause a decision in favor of the counsel making the same.

The date of the trustees deed, stated by counsel as being dated ~~February 20, 1897~~ Oct 13 1893, is dated October 1, 1898.

Record, pp. 44-46.

Many months after the deed to People's Wharf Co. on February 20, 1897.

Appellant is a widow battling against corporations for what she deems are her rights, she has an abiding faith that this Honorable Court will compel the appellee to fight fairly.

Appellee says, on p. 11: "Appellant's contention is therefore * * * * * *felo de se.*" The presumption is his typewriter made a mistake.

On p. 12 of appellee's brief, at lines 11 and 12 thereof, appellee professes to quote the following language from appellant's brief: "and against which premises the tide regularly at mean high tide ebbs and flows twice in twenty-four hours."

To appellant this seems fudging for the language used in appellant's brief on p. 11 is "and against which premises the tide regularly ebbs and flows twice in twenty-four hours."

According to the pleadings, when did these premises commence to abut on the waters of Gastineau Channel?

The day this complaint was filed.

Allegation IV., Record, p. 3.

Allegation IV., Record, p. 10.

This Honorable Court is bound by the pleadings.

The facts reasonably presumed from the pleadings and the evidence are:

That in 1897 Franklin street was between Block L and Gastineau Channel and that by the acts of nature it washed away until at the commencement of this suit Franklin street had been absorbed by the waters of Gastineau Channel. Would not then the owner of Block L be littoral proprietor? Somebody must be, and who else could be except the appellant?

According to the pleadings has plaintiff been guilty of laches?

She had no littoral rights until her premises abutted on tide water.

During none of the time from February 20, 1897, until the day this action was commenced had she any littoral rights, and any act of hers against the expenditure of moneys on Uncle Sam's tide land by this defendant or its lessor would have been the act of a meddlesome person.

Allegation III. of appellee's affirmative defense is:

"That the plaintiff during all of said years since the 20th of February, 1897, has stood by and allowed improvements of considerable value from time to time to be placed upon said premises; allowed the rents from the said premises to be collected by the Pacific Coast Company and its predecessors in interest, without objection, claim or notice of equity on her part to the said premises."

Record, p. 13.

Appellant's deed to Block L was of record ever since October 4, 1898.

Record, p. 47.

And she asserted her rights as a littoral proprietor as soon as, by the pleadings, she had any such rights. She could have maintained no action unless she was a littoral proprietor. And if she stood by and saw these improvements go up while she was a littoral proprietor why did not appellee so allege in its pleadings?

Appellant herein refers to p. 21 of her brief.

On p. 9 of its brief appellee says that it was not proven that the "People's Wharf Company" was a corporation it does not deem material." Appellant does, and submits the authority cited in her brief to show at least it had no authority as a corporation to contract.

Appellant's Brief, pp. 26, 27 and 28.

The laws of Oregon extended to Alaska only in so far as they were applicable.

The law of Oregon as to formation of corporations at the time the men composing the People's Wharf Company attempted to form that pretended corporation were as follows:

"Whenever three or more persons shall desire to incorporate themselves for the purpose of engaging in any lawful enterprise, business pursuit or occupation, they may do so in the manner prescribed in this act."

Sec. 3217, Hill's Annotated Laws of Oregon.

The next section provided they shall make and subscribe written articles of corporation in triplicate, one to be filed with the secretary of state, one to be

filed with the county clerk of the county wherein the principal business of said corporation is, and the third filed with themselves.

Sec. 3218, Hill's Annotated Laws of Oregon.

"The principal business of said company shall be carried on in the town of Juneau, District of Alaska, aforesaid."

Record, p. 60.

This Honorable Court will take judicial notice that the laws of Oregon were not applicable to Alaska as to formation of corporations and that these men did not comply with all the formalities of law.

On p. 9 appellee well says: "It is immaterial whether it was John Smith alone who was so doing, or a number of persons who, in compliance with all the formalities of law, had organized a de jure corporation."

That is law, and had the formers of that pretended corporation made compliance with all the formalities of law appellant would not now be questioning its existence.

"Estoppel cannot operate to create a corporation, even for the purpose of a private litigation, where there is no law under which such a corporation could have been organized."

Snyder vs. Studebaker, 81 Am. Dec. 415.

Heaston vs. Cincinnati, etc., R. Co., 79 Am. Dec. 430.

Evansville, etc., R. Co. vs. Evansville, 15 Ind. 395.

Brown vs. Killan, 11 Ind. 449.

Eaton vs. Walker, 6 L. R. A. 102.

Merchants, etc., Bank vs. Stone, 38 Mich. 779.

10 Cyc., p. 247.

"An intended corporation cannot become such de jure where an essential step required by statute as a prerequisite be omitted, as a failure to file articles of incorporation or filing them in the wrong county."

Capps vs. Hastings Prospecting Co., 24 L. R. A. 259.

Martin vs. Deetz, 102 Cal. 55.

10 Cyc., p. 252.

A corporation becomes de facto on the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created."

10 Cyc., supra, and authorities.

"A corporation is a creature of, and created by the law."

People vs. Golden Gate Lodge No. 6, 128 Cal. 257.

"A corporation is a creation of the statute."

People vs. Dederick, 55 N. E. 927.

"A corporation is an artificial person, and in this country is solely the creature of the law-making power."

Ex parte Selma & G. R. Co., 6 Am. Rep. 722.

Words & Phrases, 1611.

Ergo! No law, no corporation.

On p. 10 appellee urges: "And whether or not the persons who so assumed to be a corporation had a right so to do can only be questioned by the state."

That is not the law where there is neither de jure,

No. 1564

9

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

ELIZABETH DECKER,

Appellant,

vs.

PACIFIC COAST STEAMSHIP COMPANY (a corporation),

Appellee.

APPELLEE'S REPLY BRIEF.

SHACKLEFORD & LYONS,
Attorneys for Appellee, Pacific Coast Steamship Company.

GEO. W. TOWLE,
Of Counsel.

FRANAU PUBLISHING CO.

No. 1564

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit.

ELIZABETH DECKER,
Appellant,

vs.

PACIFIC COAST STEAMSHIP COMPANY
(a corporation),
Appellee.

APPELLEE'S REPLY BRIEF.

Permission having been granted to the appellee, by this court, to reply to any new matter raised in appellant's reply brief, the appellee now desires to call the court's attention to only three questions, namely:

First: To appellant's misconception of her right to sever her right of ingress and egress from her upland to deep water navigation.

Second: To her contention that there is any difference in the locus in quo between the time of her conveyance to the People's Wharf Company and the date of the commencement of this action.

THIRD: To the fact that her littoral rights, by virtue of owning land abutting on the shore, attached to the upland at the date of the townsite entry, to wit, October 13, 1893.

Referring to the first question which we desire to discuss, we wish to call the court's attention to page 2 of appellant's reply brief and the quotation from Farnham on Waters contained therein, as follows:

> "But if the title to the bed of the water is in the state, so that the right to wharf out is merely the right of the riparian owner as one of the public to make use of the common property, the owner of the upland has no interest which can be separated from the land, but the right depends exclusively upon the ownership of the shore."

The appellant bases her contention that she was without authority at the time she executed her deed to the People's Wharf Company on the above quotation from Farnham. It is true that the tide lands in the District of Alaska belong to the United States, and under the authorities, all tide lands in territories are held by the United States in trust for the future state, and consequently, no one can acquire any rights in the tide lands of Alaska as against the United States. The owner of the abutting upland has no interest in the *tide lands,* but he has *a right of ingress and egress* from his upland to deep water. He has no right to construct wharves on the tide lands as against the United States, and, therefore, can convey no such right to any one else, but he has the power to convey his right of ingress and egress. This court held in re Western Pacific R'y Co. v. South-

ern Pacific Co., reported in 151 Fed. page 376, that the upland owner has no right to build wharves or piers on the tide land, in front of his upland, but he has *a right of way,* from his upland to deep water, which the law protects. We quote the following, on page 390, from the opinion rendered by this court in re Western Pacific R'y Co. v. Southern Pacific Co., supra:

> "It may be said, in general, that such owners have the right of access to the channel or navigable part of adjacent waters, unless prevented by improvements made under the constitutional authority vested in Congress. But the question of the right of access, strictly so-called, is not necessarily here involved. The right which the appellee claims, and which was accorded it by the court below, is the right to wharf out to navigable water. At common law no such right attached to the owner of shore lands."

It is evident that the court draws a distinction between the right of access to navigable water and the right to construct a wharf in front of one's upland holding. The tide lands belong to the United States, and no one has the right to appropriate the same as against the United States, but it is the policy of the government to allow such appropriation so long as the same does not interfere with commerce and navigation. The right which the upland owner has in the tide lands in front of him is merely the right of way over the same to deep water navigation. One can certainly convey such a right of way for a valuable consideration and thereby estop himself from subsequently asserting claim to the same. In this case, the appellant, by her deed to the People's

Wharf Company (Tr. pages 55 and 56), conveyed all of her littoral and riparian rights which she then had, or which she might subsequently acquire, to the People's Wharf Company. That conveyance was made on the 20th day of February, 1897. The People's Wharf Company and its successors in interest expended large sums in improving and constructing wharves and otherwise improving said property. It is not contended by the appellant that she did not understand the force and effect of the conveyance that she then made. We cannot understand how she can now seriously invoke the power of a court of equity to undo what she then did by her conveyance and thus confiscate the property of innocent purchasers.

With reference to our second contention herein, we wish to call the court's attention to pages 10 and 11 of appellant's reply brief, wherein it is contended that at the date of the execution of the conveyance from the appellant to the People's Wharf Company, her upland abutted on Franklin Street, but at the date of the commencement of the suit, it abutted on Gastineau Channel, and counsel for appellant contends that because it is admitted in the pleadings (Tr. p. 3) "that said premises "abut on the waters of Gastineau Channel at mean "high tide, and against which premises the tide regu- "larly ebbs and flows twice in twenty-four hours", and because her deed to the People's Wharf Company states that her upland abuts on Franklin Street, therefore, her holdings have undergone a change during the time intervening between her conveyance to the People's Wharf Company and the bringing of this action. That is, that

at the time of the bringing of this action, her upland holdings at mean high tide abutted on tide water, and therefore she now has littoral and riparian rights; but at the time of her conveyance to the People's Wharf Company her upland abutted on Franklin Street, and therefore she then had no littoral rights. But we insist that it is only necessary to read the deed of the appellant and others to the People's Wharf Company, found on pages 55 and 56 of the record, to appreciate the absurdity of appellant's contention. Quoting from that deed, found on page 56 of the transcript, we find the following: "and we do, as the owners of said lots K and L, the " same abutting on Franklin Street, in said city, the said " street running along the line of ordinary high tide, and " being the shore of said Gastineau Channel, in said " town of Juneau". The language just quoted clearly shows that Franklin Street is on tide land and that it abuts on the front of appellant's lots K and L. The language of the deed states, "the same", that is the street, "being the shore of said Gastineau Channel, in " said town of Juneau".

> "The tract of land designated as shore, which may be a parcel of a manor but is prima facie in the Crown, is that strip lying along tide water over which the tide flows between the line of ordinary high tide and the line of lowest tide."
>
> Farnham on Waters, Vol. I, Sec. 45 (c).

There is nothing in the record to show that Franklin Street was ever anywhere else except on the tide land in front of the appellant's property, blocks K and L.

The only remaining question which we desire to discuss in this reply brief is the question as to whether appellant became entitled to any littoral rights by virtue of her interest in blocks K and L.

The townsite of Juneau was entered on the 13th day of October, A. D. 1893, and appellant and her grantors were then in possession of the upland abutting on the tide land in controversy (Tr. page 53). It is a well settled rule of law that the interest of the occupants of a townsite accrue at the date of the townsite entry, and that any one in possession of land at the date of the entry is entitled to a patent, or a trustee's deed, for the land. Whatever littoral rights any occupant may have by virtue of ownership of upland, he acquires at the time of the date of the townsite, and the subsequent issue of patent to the townsite and a trustee's deed to him cannot enlarge or increase such littoral rights; in fact, it has been held that one in possession of uplands, in good faith, in the District of Alaska, takes the same littoral rights as are incident to ownership in fee.

Lewis v. Johnson, 76 Fed. page 476.

In the case last cited, the court did not base its ruling on the fact that the townsite of Juneau had been entered, but held that the possession, in good faith, of upland, gave to such upland owner all littoral rights which he could possess had he a fee simple title to the land. However, the appellee need not rely on the holding in the last case cited, for the reason that it is conceded, as before stated, that the townsite of Juneau was entered on the 13th day of October, 1893, and that appellant was in

possession of the land at that time, while she did not deed the property in controversy to the People's Wharf Company until the 20th day of February, 1897 (Tr. pages 55 and 56). We submit that it is a universal rule of law, to which there is no exception, that those in possession of property within a townsite, at the date of the entry, acquire by virtue of such possession an indefeasible right to a patent to that land; and that the issuing of patent subsequently is a mere ministerial act, and confers upon the occupant no greater rights concerning the property and no greater interest in the same than he had acquired by virtue of his occupancy on the date of the entry of the townsite.

Ashby v. Hill, 119 U. S. p. 529;
Cofield v. McLellan, 16 Wallace p. 334;
Stringfellow v. Cain, 99 U. S. p. 610;
Simons v. Wagner, 101 U. S. p. 260;
Barnay v. Dolph, 97 U. S. p. 656;
Cornelius v. Kessel, 128 U. S. 456;
Lewis v. Campbell, 29 L. D. p. 357.

Through an oversight in our brief in chief (see page 11 thereof), we stated that a trustee's deed had been issued to appellant on the 13th day of October, 1893; that mistake, however, is immaterial for the reason that the townsite of Juneau was entered on the 13th day of October, 1893, and the appellant acquired at that time such an interest in the upland as to entitle her to all littoral and riparian rights which she could acquire were she then the owner of the upland in fee; consequently, when she executed her deed to the People's Wharf Com-

pany, in February, 1897, she conveyed all the littoral rights that the owner of the upland could have acquired, and by such deed estopped herself from thereafter denying the right of the People's Wharf Company, and its successors in interest, to occupy the tide land in front of her premises for wharf purposes, and in whatever manner they chose.

It seems to us, therefore, that the decision of the lower court should be upheld for all of the reasons stated in the opinion of the trial judge, which are substantially as follows:

(1) That it conclusively appears from the evidence that appellant has sued the wrong party, for the undisputed evidence shows that the Pacific Coast Company is the owner of the premises in controversy, and maintains, and has maintained at all times since and prior to the commencement of this action, the structures and buildings of which the appellant complains.

(2) That appellant conveyed all of her right, title and interest in and to the premises in controversy to the grantors of the Pacific Coast Company long prior to the commencement of this action

(3) That the appellant's failure to assert her right to the premises in controversy during a period of ten years, and during which time she permitted the Pacific Coast Company and its grantors to incur large expense in improving the property, without protest, estops her from now questioning the right of the Pacific Coast Company, or its lessee, to occupy the premises in whatever manner they see fit.

And we submit that any of the foregoing reasons is sufficient to warrant this court in affirming the judgment of the trial court.

Respectfully submitted,

SHACKLEFORD & LYONS,
Attorneys for Appellee, Pacific Coast Steamship Company.

GEO. W. TOWLE,
Of Counsel.

NO. 1564.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH DECKER, Appellant,

vs.

PACIFIC COAST STEAMSHIP COMPANY,
a corporation, Appellee.

E. M. Barnes' Appearance as Amicus Curiae

SHACKLEFORD & LYONS,
Attorneys for Appellee.
GEO. W. TOWLE, of Counsel.

E. M. BARNES,
Amicus Curiae.

Filed this..... day of July, A. D. 1908.

Clerk.

By.....Deputy Clerk.

The Transcript Press, Juneau, Alaska

NO. 1564.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH DECKER, Appellant,

vs.

PACIFIC COAST STEAMSHIP COMPANY,
a corporation, Appellee.

E. M. Barnes' Appearance as Amicus Curiae

SHACKLEFORD & LYONS,
Attorneys for Appellee.
GEO. W. TOWLE, of Counsel.

E. M. BARNES,
Amicus Curiae.

Filed this.....day of July, A. D. 1908.

Clerk.

By.....Deputy Clerk.

The Transcript Press, Juneau, Alaska

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH DECKER, Appellant,

vs.

PACIFIC COAST STEAMSHIP COMPANY,
a corporation, Appellee.

And now comes E. M. Barnes and asks that leave be given him to appear as Amicus Curiae herein for the purpose of showing wilful deceit of this Honorable Court by the attorneys and counsel for appellee herein, as appears from appellee's reply brief herein.

After leave being granted the said deceit consists as follows:

Quoting therefrom and commencing at line 10 and p. 5 of appellee's reply brief "Quoting from deed, found on p. 56 of the transcripts we find the following: "and we do, as the owners of said lots K and "L, the same abutting on Franklin street, in said

"city, the said street running along line of ordinary "high tide, and being the shore of Gastineau chan- "nel, in said town of Juneau."

The record is as follows commencing at the word "and" in line 3 of page 56 of the transcript "And "we do, as the owners of said lots K and L the same "abutting upon Franklin street in said city, the said "street running along the line of ordinary high tide, "being the shore of Gastineaux channel, in said town "of Juneau."

Record p. 56 commencing on line 3.

The word "and" interjected after the comma following "high tide," and before the word "being" intends to deceive this Honorable Court as to the description in said deed making the reading extremely more favorable for appellee.

Respectfully Submitted,

E. M. BARNES,

Amicus Curiae.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH DECKER, Appellant, vs. THE PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Appellee.	No. 1564

PETITION FOR REHEARING

E. M. BARNES,
Attorney for Appellant.

Alaska Daily Record Print, Juneau, Alaska

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH DECKER,
Appellant,
vs.
THE PACIFIC COAST STEAMSHIP COMPANY, a Corporation,
Appellee.

No. 1564

PETITION FOR REHEARING

PETITION FOR REHEARING.

To the Honorable Judges of the above entitled Court:

Comes now the above named appellant and most respectfully petitions the Court that the opinion and judgment herein may be set aside and a rehearing granted for the reasons of manifest error and mistake in considering the facts herein as the same appear to the appellant, and the appellant most respectfully in that behalf represents to this Honorable Court that:

On page 8 of the said opinion this Honorable Court says, in referring to the case of McCloskey vs. Pacific Coast Company, 160 Fed. 164: "The court upon the evidence of the dedication and grant by deed of the strip of land for a sidewalk and

street along the water front of plaintiff's premises, held that the plaintiffs had by dedication and deed parted with all its litoral rights." Appellant respectfully submits that at the time of the making of the deed, February 20, 1897, she had no litoral rights and as it appears to appellant there is neither allegation, evidence of, or finding that appellant was at that time a litoral proprietor save and except in inference to be drawn from this Honorable Court's opinion on page 9 thereof.

As appears to appellant the evidence is undisputed that at the time of the making of the deed, February 20, 1897, Franklin street was between Blocks K and L and the shore of Gastineau Channel; vide Deed p. 56 of Record, lines 6, 7 and 8; Deed page 65 of Record, last paragraph; Map page 68 of Record.

This Honorable Court on page 9 of its opinion says: "We are of the opinion that whatever appellant's rights may have been as to the ownership of land abutting on navigable waters, she parted with such rights in the deed of February 20, 1897, and the appellants, lessor, has succeeded to said rights."

Appellant respectfully submits that she was not a litoral proprietor at the time of the making of the deed.

Citations above noted.

The judgment of this Honorable Court, being based on the fact that appellant was, at the time of making the deed, February 20, 1891, a litoral proprietor, is it not axiomatic if she was not then a litoral proprietor, that under this Honorable Court's own decision herein cited, McCloskey vs. Pa-

cific Coast Company, this judgment should be set aside?

The only evidence of her being a litoral proprietor is at the time of the commencement of this action:

Vide: Allegation 10, p. 3 Record, which allegation is not denied.

Vide: Trial court's finding, lines 12-14, p. 30 Record.

This Honorable Court on page 7 of its opinion says: "It is contended by the appellant that the evidence relating to this deed was incompetent and should have been excluded on the ground that Congress alone had the power to make grants below high water mark in the Territory of Alaska. Appellant also objected on the further ground: "it appears from a perusal of the deed that Franklin street was between the land owned by the grantors and ordinary high tide and therefore the grantors had no litoral rights to convey." Record, pp. 53-54.

This Honorable Court on p. 7 of its opinion says: "But it cannot be ascertained from the allegations in the complaint in this case * * * in what manner the maintainance of the buildings and wharf by the appellee in front of her premises prevents her from having access to the navigable water of Gastineau Channel."

"That said buildings are known as the Union Iron Works and the said wharf is between them and deep water." — —Allegation IX. Plaintiff's Complaint Record, pp. 4-5; and this allegation is not denied.

Appellant suggests this Honorable Court should take judicial notice that buildings used as iron works are not "suitable

structures for the accommodations of the public in the discharge and shipment of passengers and merchandise arriving and departing by water at the port of Juneau.''

The last quotation is from lines 9 to 12 of page 7 of this Honorable Court's opinion. To appellant it being manifest that mistake of facts have been made by this Honorable Court as above specified she respectfully asks a rehearing herein and that she may be permitted to make a re-argument herein and to file further briefs herein.

Respectfully submitted,

E. M. BARNES,

Attorney for Appellant.

I hereby certify that in my opinion the above petition for rehearing is well founded and I further certify that it is not interposed for delay.

E. M. BARNES,

Attorney for Appellant.

Dated, Juneau, Alaska, November 7, 1908.